(16,804.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 591.

FLINT, EDDY & COMPANY, APPELLANT,

vs.

GEORGE CHRISTALL AND JAMES GREIG, AS TRUSTEES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 17, 1898.

1 United States Circuit Court of Appeals, Second Circuit.

GEORGE CHRISTAL and Another, Libellants and Appellees,
against
FLINT, EDDY & COMPANY, Respondent and Appellant.

A decree in favor of the libellants for $636.70, for general average contribution, interest, and costs having been made by the district court of the United States for the southern district of New York, and an appeal having been taken therefrom to this court, and the cause having come on for hearing, a question of law arose concerning which this court desires instructions of the Supreme Court of the United States for its decision. The facts out of which the question arose are as follows:

Statement of Facts.

On November 9th, 1895, the British steamship *Irrawaddy*, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped, and supplied and was seaworthy.

The vessel was relieved from the strand November 20th as the result of sacrifices by jettison of a portion of her cargo and of sacrifices and losses voluntarily made or incurred by the ship-owners through the master and of the services of salvors.

The *Irrawaddy* then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on
2 their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usuages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo, and the losses and sacrifices of the ship-owner.

The respondent thereupon paid $4,483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the ship-owner, which they refused to pay.

The district court made a decree in favor of the libellants; from which decree the respondent duly appealed to this court.

Upon these facts the court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship-owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped, and supplied, under the provisions of section 3 of the act of February 13th, 1893, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight, and cargo?

Let a copy of the opinion and the pleadings in the district court be appended to this certificate.

WM. J. WALLACE.
E. HENRY LACOMBE.

3 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of George Christall and James Greig, as trustees, against the company incorporated under the name of Flint, Eddy & Co., in a cause of action for contribution in general average, respectfully shows, upon libellants' information and belief:

First. Libellant Christall now resides at Glasgow, Scotland, formerly having been a resident of New Jersey, and said James Greig resides at Upper Montclair, New Jersey, and they exhibit this their libel as trustees under a certain general average bond as hereinafter stated. The respondent is, and was at all the times hereinafter mentioned, a corporation organized under the laws of the State of Maine, but has an office and place of business in the city of New York, within this district.

Second. The steamship *Irrawaddy*, on November 1st, 1895, departed from port of Spain, Trinidad, bound for New York via Grenada, and was engaged in transporting merchandise and property to the port of New York.

Third. The owner of the *Irrawaddy* had exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, and at all times before the casualty of November 9, 1895, said vessel was seaworthy; and was always properly manned, equipped and supplied.

Fourth. On November 9, 1895, by an error of navigation in dense fog the *Irrawaddy* went aground and remained fast on the coast of New Jersey near Asbury Park.

Efforts were made to float the vessel by working the engines full speed astern, by which large quantities of sand got into the machinery causing damage. Further sacrifices on the part of

4 the vessel were made, including the opening of sluices, cutting holes through bulkheads, and flooding the engine-room, as well as the jettison of cargo.

During much of the time that the vessel was aground heavy storms prevailed, causing the vessel to pound and threaten to become a total loss, which rendered the above sacrifices necessary for the preservation of all interests. Finally on November 20th, the vessel was floated by the Merritt Wrecking Organization, by whom she was brought to New York.

Fifth. Among the merchandise transported by the *Irrawaddy* and partly delivered were 8 boxes of feathers, 1,262 hides, 10 bales and one box of rubber, and three bales of balsam, which were consigned to and the property of the respondent.

Sixth. Thereafter and on November 23d, 1895, the respondent, by its treasurer, duly executed and delivered to the libellants, as trustees for all concerned, the usual general average bond, whereby the respondent covenanted and agreed that all losses and expenses

which should be made to appear to be due from respondent in respect to said merchandise should be paid by the respondent, provided that such losses and expenses should be stated and apportioned by Johnson & Higgins, average adjusters, in accordance with the established usages and laws in similar cases.

Seventh. A general average adjustment was made up by said adjusters in accordance with such usages and laws, whereby it appeared that the contributory value of the respondent's said merchandise was $13,649, and the amount due therefrom for general average was $5,254.63, against which was a credit for proceeds of unidentified hides of $262.70, leaving a balance due and payable under said average bond of $4,991.93, which adjustment was duly made up and stated on the fifteenth day of May, 1896.

Eighth. By reason of the circumstances of the stranding,
5 the respondent denies any liability for the vessel's losses and sacrifices, and instead of paying the full amount due under said adjustment, has only paid $4,483.64, leaving due a balance of $508.29, which represents the respondent's share of the losses and sacrifices made in the efforts to float the vessel and cargo and allowed to the ship-owner, in said adjustment.

Ninth. The libellants, as trustees for the owner of the *Irrawaddy*, have demanded from the respondent payment of said sum of $508.29, but that no part thereof has been paid.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore, libellants pray that process issue *in personam* against the respondent, and it be cited to appear and answer all and singular the foregoing, and that the libellants be decreed payment of said sum, with interest and costs, and that libellants have such other and further relief as may be just.

(S'g'd) JAMES GREIG.

Sworn to before me, by said James Greig, for himself and for his colibellant, this 3rd day of March, 1897.

ERNEST W. CONGDON,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in N. Y. county.

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for the Libellants.

(Endorsed:) Libel. Filed March 3, 1897.

6 To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

Flint, Eddy & Co., proceeded against in this court on the libel of George Christall and James Greig, as trustees, answer said libel as follows:

First. The respondents admit the allegations in the first article of the said libel contained.

Second. The respondents, upon information and belief, admit the allegations in the second article of the said libel contained.

Third. The respondents have no knowledge or information respecting the matters alleged in the third article of the said libel, but do not dispute the same.

Fourth. The respondents, upon information and belief, deny the allegations in the fourth article of the said libel contained, and aver that the circumstances were as follows:

On November 9th, 1895, by the fault and negligence of the servants of the ship-owners in charge of the navigation of the *Irrawaddy*, the steamer went aground and remained fast on the coast of New Jersey, near Asbury Park. Efforts were made to float the vessel by reversing the engines, and thereby sand got in the machinery, causing damage. The vessel pounded and strained heavily on the strand and thereby a large quantity of water found its way into the after hold and the sluices were opened to let such water into the engine-room.

The Merritt Wrecking Organization, as salvors, had come to the relief of the vessel and had placed the pumps in the engine-room for the purpose of freeing the vessel of water.

Later the sluices in the after bulkhead became choked, and thereupon holes were cut in the bulkhead to allow the water to pass to the pumps in the engine-room.

F-nally on November 20th the vessel was floated by the salvors, by whom she was brought to New York.

7 During the salvage operations and for the purpose of relieving the vessel from the strand, large quantities of cargo were jettisoned and with the freight thereon became lost.

Fifth. The respondents admit the allegations in the fifth and sixth articles of the said libel contained.

Sixth. The respondents admit that an adjustment has been made up by said adjusters, which adjustment bears date the 15th day of May, 1896, whereby it appears that the contributory value of the respondents' said merchandise is $13,649, and the amount due therefrom for general average is $5,254.63, against which is a credit for proceeds of unidentified hides of $262.70, leaving a balance due and payable of $4,991.93. But the respondents deny that such adjustment is a general average adjustment made up in accordance with established usages and laws in similar cases, or that said adjustment is duly made up and stated; but aver that it is incorrectly made up in the respects hereinafter designated.

Seventh. The respondents admit the allegations in the eighth and ninth articles of the said libel contained and admit that the premises are within the admiralty and maritime jurisdiction of the United States and of this court; but they deny that all the premises are true.

Eighth. Further answering the said libel, the respondents aver that the said adjustment is not duly made and stated, and is not in accordance with usages and laws in similar cases in that it admits and allows as expenses to be contributed for by the cargo in general average, the costs and charges of the owners of said vessel in respect

to the damages to the steamer through reversing the engines, as aforesaid, whereby sand got in the machinery, and through opening sluices and boring bulkheads as aforesaid; and further in that it admits and allows as an item to be contributed for in general average in favor of the ship-owners the full amount of freight on jettisoned cargo in the amount of $600.65, whereas such amount
8 of freight would have been earned only upon delivery of such cargo in New York; and in view of the expenses necessary to earn said freight the interest of the owners therein at the time of the jettison of the cargo and the loss of the freight was only $510.

The respondents aver that inasmuch as the stranding of the *Irrawaddy* was due solely to the fault and negligence of the servants of the ship-owners in charge of her navigation, none of the above allowances should have been admitted by the adjusters.

The respondents further aver that the share or portion of such allowances which have been charged in said adjustment against the cargo of the respondents aggregates the full sum of $508.29, which amount they have accordingly refused to pay, although they have paid all other and proper charges of a general average character stated in said adjustment. That of the said sum of $508.29 about $400 is in respect of the damage caused by sand getting into the machinery through the reversing of the engines as aforesaid.

Ninth. The respondents further aver that in the event that they are found liable by this court in respect to any of the said alleged losses and sacrifices of the ship-owners, the amount thereof which has been charged in said adjustment against the respondents' cargo in respect of freight upon jettisoned cargo is excessive in the amount of thirteen $\frac{65}{100}$ dollars by reason of full freight on such cargo being allowed to the ship-owners in lien of net freight only.

Tenth. All and singular the premises are true.

Wherefore the respondents pray a judgment of this court, and that the libel herein be dismissed with costs.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Respondents,
54 *Wall Street, New York City.*

9 CITY AND COUNTY OF NEW YORK, } ss.:
Southern District of New York, }

A. De Buys, being duly sworn, says that he is the 1st vice-president of Flint, Eddy & Co.; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his best information and belief.

A. DE BUYS.

Sworn to before me this 24th day of May, 1897.

FRANKLIN ABRAMS,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

Endorsed: Answer. Filed May 26, 1897.

10 United States District Court, Southern District of New York.

GEORGE CHRYSTAL *et al.*
vs.
FLINT, EDDY & Co.

In admiralty. General average. Negligence. Harter act.

BROWN, *J.:*

In November, 1895, the British steamship *Irrawaddy*, upon a voyage from Trinidad to New York, stranded on the coast of New Jersey, through negligence in navigation. Up to the time of stranding it is admitted that she was properly manned and equipped, and seaworthy. In endeavoring to get her off the beach by working her propeller with reversed engines, her machinery was damaged by sanding and by water from leaks, which was allowed to flow into the engine-room in order that it might be pumped out; and, on the sluices becoming choked, holes were bored in the bulkhead to permit the water to pass to the pumps. With the aid of salvors, the vessel was finally floated on November 20th, after a jettison of a considerable quantity of cargo. She then completed her voyage and made delivery of the rest of the cargo to the consignees in New York, on their executing an average bond for the payment of all losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with the established usages and laws in similar cases."

An adjustment was afterwards made in New York which allowed in the general average account (1) the salvor's compensation, (2) the value of the jettisoned cargo, and (3) to the ship-owner,
11 the gross freight on the cargo jettisoned, and (4) the damages to the ship by sanding and by the flow of water into the engine-room. The respondents thereupon paid $4,483.64, their full assessment, except the sum of $508.29 charged against them for the last two items above named, which they refused to pay, on the ground that as the stranding was caused by negligence in navigation, the ship-owners were debarred from any recovery of general average from the cargo; they also claim that if any freight is recoverable for the goods jettisoned, it is only the *net* freight—*i. e.*, the gross freight less the stevedore's and other charges which would have been incurred by the ship-owners on the actual delivery of the goods had they not been jettisoned. The difference, it is agreed, would in this case be $13.65.

The above libel was filed upon the general average bond, for the recovery of the last two items in the general average adjustment above named, on the ground that as the ship-owners are not responsible to the cargo-owners for the negligent navigation of the ship under the provisions of the Harter act of 1893 (2 Sup. Rev. St., 89), such negligence does not now debar them from general-average claims; and that gross freight is recoverable, because such is the established law and usage of this country and of this port. All the facts are admitted, except as to the custom in regard to charging

gross freight, upon which point witnesses have been examined upon both sides.

The questions presented are important, because they enter largely into every case of a general average adjustment growing out of faults or errors of navigation; and it is essential that the rule which is to be followed in average adjustments in cases falling within the Harter act should be finally determined.

There is no doubt of the ordinary rule, in the absence of statute or contract to modify it, that where the peril has been brought about by the fault of the ship-owner or his servants in the navigation of the ship, the ship-owner cannot recover from the cargo reimbursement by means of a general average for his expenses in rescuing the ship or cargo. The codes of the principal maritime countries
12 so provide in express terms; and our law is the same. Gourlie Gen. Avg., 15; Lowndes on Avg., 4th ed., 34; *The Ontario*, 37 Fed., 222; Ralli *v.* Troop, 37 Fed., 888, 890; Vanden Toorn *v.* Leeming, 70 Fed., 251. This rule is not enforced against the ship-owner alone; it applies equally to the cargo-owner, and to any other claimant of contribution by whose fault the necessity for the sacrifice or expense was caused. Several of the maritime codes expressly so state (Germany S. S., 704; Sweden S. S., 191; Denmark S. S, 192; Spain S. S., 810). Lowndes summarizes the principle and the general rule as follows:

"The broad principle may be laid down that no one can make a claim for general average contribution, if the danger to avert which the sacrifice was made has arisen from the fault of the claimant, or some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors," p. 34.

Considering that the claim to contribution in general average rests only upon equitable principles, it is hardly conceivable that this rule of exclusion could be otherwise. For if one's own fault, or the fault of those for whom one is legally responsible, has made necessary the expenses he incurs to retrieve it, there is no principle of equity that can sustain his claim that other persons, not in privity with him, should help him bear the loss. It is the responsibility for the fault and for the consequent damage that makes the crucial distinction in these cases. All the maritime codes that exclude the ship-owner from reimbursement in general average for the ship's fault make him liable to cargo-owners for the master's bad navigation. This exclusion is based on his liability to the cargo-owner, which logically and necessarily excludes the ship-owner's claim to contribution in two ways: First, because the obligation to indemnify would require the ship-owner at once to restore to the cargo-owner as damages whatever he might collect from him as general average; second, because this same obligation makes the ship-owner's claim to contribution incompatible in its inception with the funda-
13 mental conditions of a general average claim, viz., that there must be (1) a sacrifice, (2) a sacrifice voluntarily incurred, (3) a sacrifice incurred for the common benefit. But when the ship, through the master's fault, is legally responsible for all loss and damage, her expenses in rescuing the cargo from the peril which

that fault has brought about cannot possibly be treated as a sacrifice, since such expenses are nothing more than the performance of a legal obligation; for the same reason they are not *voluntarily* incurred, in the legal sense, since the ship is legally bound to make the rescue and bear all the expense of it, or else pay the increased damages from omitting to do so; and so the expenses of rescuing the cargo are not ultimately for the cargo's *benefit*, but for the pecuniary benefit of the ship, in diminishing as much as possible the cargo damages for which the ship's liability is already fixed by reason of her fault. Thus the ship's liability for all the loss and damage arising from her fault, whenever this liability arises, necessarily excludes any equitable claim by her owner to an average contribution from the cargo, because the legal conditions of such a claim cannot in such a case exist; and because, if allowed, any such contribution must be at once repaid to the cargo-owner as damages.

I have dwelt somewhat fully upon this liability of ship and owner, and its relation to general average claims against the cargo, because there is no doubt, I think, that the liability to indemnify the cargo-owner is the sole ground of the exclusion of the ship-owner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation; and because it, therefore, seems necessarily to follow that in cases where all such liability is abolished by law, as it is under the circumstances of this case by the Harter act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average.

14 Where due diligence has been exercised to make the ship seaworthy, and a common danger arises upon the voyage by "fault or error in the navigation or management of the ship," the third section of that act declares that "neither the vessel nor her owner, agent or charterer shall become or be held responsible for damage or loss resulting therefrom." The previous liability of the ship-owner to the cargo-owner for faults of navigation is thus abolished in all cases coming within the act. In such cases faults in the navigation or management of the ship are no longer, by construction of law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo-owner for his damages therefrom than the latter is liable to the ship-owner for the resulting damages to the ship. Both are alike strangers to the fault, and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice, voluntarily incurred, and for the common benefit, as much and as truly so when made by the ship-owner as when made by the cargo-owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifices as the other.

In this country and in England it has been held that the mere

fact that the common peril arose by bad navigation, or bad management of the ship, or that a remedy in damages therefor may exist against the ship-owner, does not prevent recovery of general average compensation by a cargo-owner against the ship and against other cargo-owners for his sacrifices made for the common benefit—Pacific Mail S. S. Co. *v.* N. Y. H. & R. Mining Co. (City of Para), 69 Fed., 414; affd., 74 Fed., 564; Strang *v.* Scott, L. R., 14 App. Cas., 601, 609—and several of the maritime codes expressly so declare (German Code S. S., 704; Sweden 1864, act 144, Code 191; Norway
15 S. S., 72; Denmark S. S., 192). In Strang *v.* Scott, *supra*, Lord Watson, in delivering judgment in House of Lords, says: "The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettision, their equitable claim to be indemnified (by a general average contribution) for the loss of their goods is just as strong as if the peril has been wholly due to the action of the winds and waves."

Under this decision, if the ship-owner be "innocent of exposing the ship and cargo to the common peril," as he is under the Harter act, or wherever a valid exemption from liability exists by the bill of lading, the ship-owner's right to an average contribution must be sustained. Accordingly, in the subsequent case of the Carron Park (L. Rep., 15 Prob. Div., 403), Lord Hannen, then president of the probate division, sustained the ship-owner's claim to contribution from the cargo in general average for expenses caused by negligent navigation, where by the terms of the bill of lading the ship-owner was relieved of all responsibility for such negligence; and this upon the simple ground that "the relation of the goods-owner to the ship-owner has been altered by the contract that the ship-owner was not to be responsible for the negligence of his servants." Upon similar clauses in the bills of lading, the same adjudications, and upon the same ground, have been made in the French court of cessation (*L'Amerique*, Dalloz Rep., 1878, 1, 479; *The Alex. Lawrence*, 10 Rev. Int., *du Droit Mar.*, p. 147 (June, 1894); and also in Belgium, *The Alarcity*, 11 do., 123 (1895); though the contrary seems to have been held in Holland. See *The Mary Thomas* (1894), Prob. Div., 104, 108, 113, 116.

It is urged that the Harter act makes no allusion to general average, and was not designed to disturb the law on that subject. This might have been urged more plausibly as the effect and intent of the negligence provisions in bills of lading. Several of
16 the above adjudications as to the effect on general average of such clauses in bills of lading were made long before the passage of the Harter act; and the history of that act shows that it was a part of its general intent to secure to ship-owners under our law, and within the limits prescribed by our act, the benefits enjoyed by ship-owners under such bill-of-lading exemptions by the foreign law. One of the benefits to the ship-owner by the foreign law under such exemptions, as already adjudged when the Harter act was passed, was the right to a general average contribution; and the inference, if any, as to the actual intent of our act would be

that it was designed to embrace that incidental consequence; at least, the contrary cannot be affirmed.

Quite aside, however, from the above adjudications, and from the question of any definite intent by Congress to modify the law of general average, the ordinary rules of construction require that the exemption which the act is evidently designed to afford to the ship-owner from his previous responsibility to the cargo-owner, should be given its full natural scope and effect, without abridgement by any arbitrary or narrow construction that is not warranted by anything apparent in the context, or from the evident object of the statute. "The whole object of the act," says Mr. Justice Brown in *The Delaware* (161 U. S., 459), "is to modify the relation previously existing between the vessel and her cargo," and to fix that relation—that is, a relation of non-responsibility for damages or losses arising out of bad navigation. Such a statutory change in a broad principle of law must carry with it other changes as its necessary accompaniment. In abolishing the previous responsibility of the ship and owner, the intent of the statute must be presumed to be to abolish also whatever is immediately dependent upon that responsibility. In no other way can the statute have its fair and natural effect.

The application of this new relation of non-responsibility under the Harter act to cases of general average does not, in fact, make the least change in the principles of general average contribution.

The rule remains as before, that he by whose fault, actual or
17 constructive, the ship and cargo have been brought into danger cannot recover an average contribution for his expenses in extricating them. And so the counter-rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue, is entitled to an average contribution from what is thereby saved. Prior to the Harter act, the ship-owner, under our law, was constructively in fault for bad navigation, and hence fell within the former rule. The Harter act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter.

In Ralli *v.* Troop, 37 Fed., 898, it was said that "to deny the owners the benefit of a general average contribution on the ground of negligence would impose on them, in effect, a liability for the fire from which the statute exempts them (Rev. St. *S.* S., 4282);" and so in the present case, to say that the ship-owners shall bear at their own charge all the expenses voluntarily incurred by them in rescuing this ship and cargo from a common peril for which the statute says they shall not be responsible, and to give to the cargo-owner all the benefits resulting to him from these expenses, without charge, by refusing to impose on him the ordinary contribution in general average always hitherto made to one not in fault, is, in effect, to make the ship-owner responsible *pro tanto* for the peril and its consequences, contrary to the very letter and purpose of the statute; since the owner is often practically compelled to make these advances

for the common safety, though not legally responsible for the fate of the cargo.

It is, indeed, the owner's duty to relieve ship and cargo in every peril so far as in his power, but not to do this at his own charge, unless the peril arose through his actual or constructive fault (*The Portsmouth*, 9 Wall., 682, 687). If the law denied contribution to him for sacrifices made for the common good when he was not in fault, the result plainly would often be disastrous to cargo. Maritime policy and necessity not only forbid any such rule, but ages ago they established the opposite rule: that compensation
18 shall be made to those who, not standing in any relation of legal responsibility, make sacrifices for the common safety. The Harter act certainly was not designed to disturb that principle; and it requires that the owners in this case shall receive due contribution from the cargo.

2. Nor do I think, upon the proof, that any error was made in allowing contribution for the gross freight on the cargo jettisoned, without deduction for the slight expense which would have attended actual delivery.

The condition of the average bond upon which the action is brought is, that the losses and expenses shall be apportioned by the average adjusters "in accordance with the established usages and laws in similar cases." The general rule requires the adjustment of average to be made according to the port of destination, or where the voyage is ended, which in this case was New York. The evidence shows clearly that the long established usage here has been to allow the gross freight; and where the bond adopts the local usage, it controls, even if the general law were otherwise (Stewart *v.* West India Pac. Co., L. R., 8 Q. B., 88).

But the general law of this country, and largely elsewhere, except in England, seems to be in accordance with the custom here. Per Story, J., in *The Nathaniel Hooper*, 3 Sumner, 542; Columbia Ins. Co. *v.* Ashby, 13 Peters, 331, 334; *The Ann D. Richardson*, Abb. Adm., 499, 507; Dixon Mar. Ins., 2d ed., 148; Gourlie Gen. Avg., 109, 112; 2 Phil. Ins. S. S., 1301, 1368; 1 Valin, p. 654–'5; Art. 304, Code de Com.; 2 Valroger Com., p. 366; 3 Desjardins Dr. Mar., p. 682; Ulrich Grosse Har., p. 59; Italian Code S. S., 576; Nuova Cod. per Castagnola, p. 435 (1896); 1 Magen's Ins., 289.

The same practice seems to have prevailed for a long period in England, but has been of late modified by the adjusters there. Some efforts have been made by protests, as appears from the evidence, to introduce here the recent English practice, but thus far with so little result as plainly not to amount to any change in the prevail-
19 ing usage. If the amount of expense, though small, which the ship actually saves by not delivering the jettisoned cargo could, as a rule, be accurately ascertained at a comparatively small cost, I see no good reason why the existing custom should not equitably be modified, and the deduction allowed. But under the usage so long and widely prevailing, I do not feel authorized to hold that the adjustment in this case is incorrectly made up. Most of the ship's expenses remain the same, whether a part of the cargo is jetti-

soned or not, such as for wages, provisions, insurance, wear and tear, pilotage, towage, wharfage, etc.; only the mere handling of the cargo seems to remain, and that was done formerly, and is to some extent still done, by the crew, so that the handling of the jettisoned cargo would have caused little, if any, additional expense to the ship. If stevedores are employed to unload the ship, as is now becoming general, the saving of the cost of handling the jettisoned cargo is probably easily ascertainable; and when that becomes the established general method of business, the usage of adjusters in the allowance of freight, it would seem ought to be and probably will be modified accordingly.

Decree for the libellants for the two items claimed, with costs.

Sept. 9, 1897.

20 UNITED STATES OF AMERICA, *Second Circuit*, } *ss*:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled George Christal and another against Flint, Eddy & Company was duly filed and entered of record in my office by order of said court on the 5th day of February, 1898, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

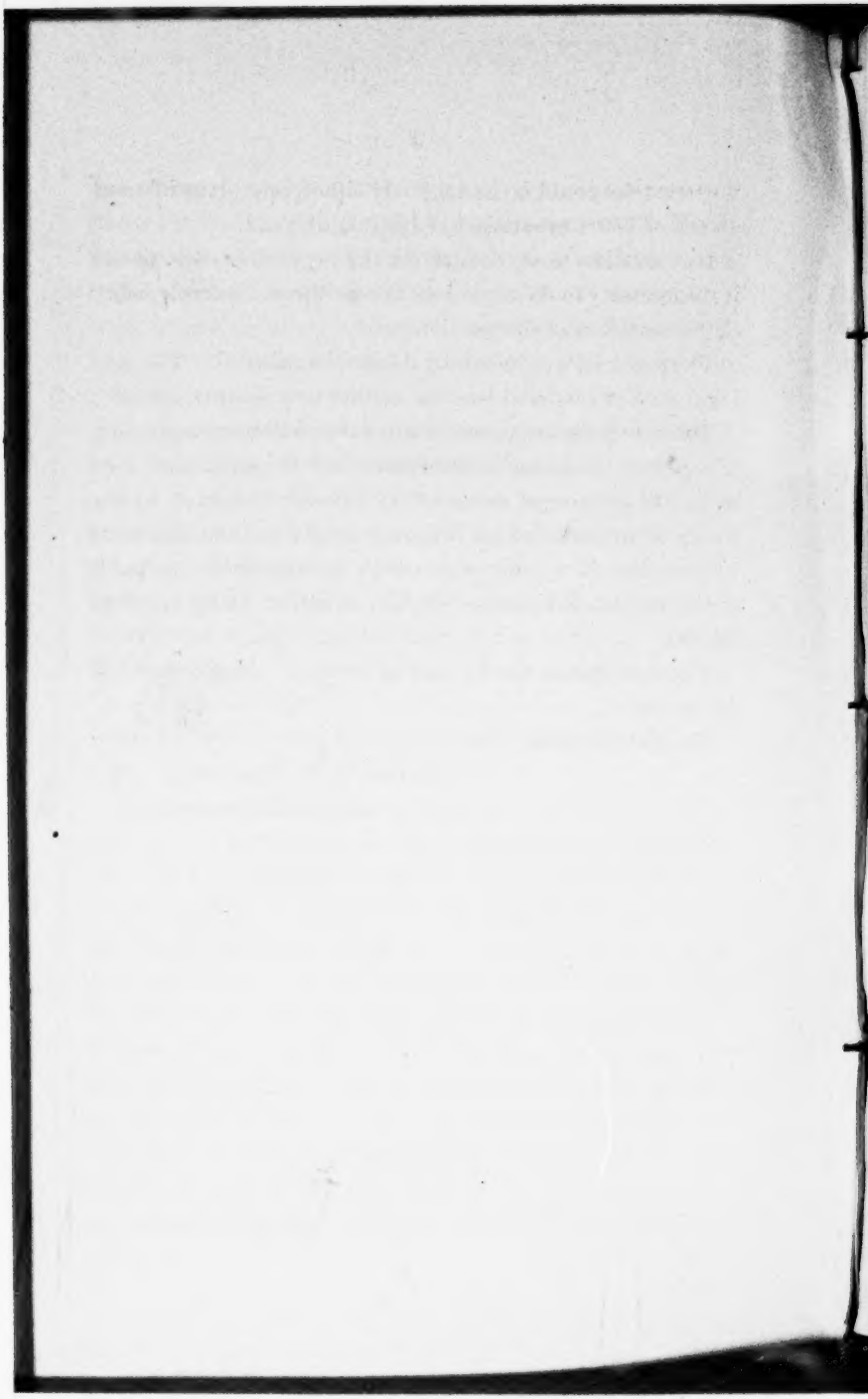
In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 5th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk*.

21 [Endorsed:] United States circuit court of appeals, second circuit. George Christal and another, libellants, appellees, *vs.* Flint, Eddy & Company, respondents, appellants. Certificate. United States circuit court of appeals, second circuit. Filed Feb. 5, 1898. William Parkin, clerk.

Endorsed on cover: (Certificate.) Case No. 16,804. U. S. C. C. of appeals, 2nd circuit. Term No., 591. Flint, Eddy & Company, appellant, *vs.* George Christall and James Greig, as trustees. Filed February 21st, 1898.



MAR 4 1898
JAMES H. McKENNEY
CL

No. 591.

(on mo.)

Bef. of Mynderse for Appts.

Filed Mar. 4, 1898.

Supreme Court of the United States, 1

October Term, 1897.

FLINT, EDDY & COMPANY, Respondents-Appellants, AGAINST GEORGE CHRISTALL and another, Libellants-Appellees.	No. 591.

2

Notice of Motion.

Please take notice, that the annexed motion for the advancement of the case arising upon the certificate herein sent up to this Court by the United States Circuit Court of Appeals for the Second Circuit, will be presented at the opening of the Court, at the Capitol, in the City of Washington, on Monday, March 7, 1898.

New York, March 3, 1898.

BUTLER, NOTMAN, JOLINE & MYNDERSE, 3
Proctors for Appellants.

To Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Appellees.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

FLINT, EDDY & COMPANY, Respondents-Appellants, AGAINST GEORGE CHRISTALL and another, Libellants-Appellees.	No. 591.

Motion to advance case.

Come now the appellants, Flint, Eddy & Company, a corporation, by Wilhelmus Mynderse, their counsel, and move this Honorable Court that this case, arising under the certificate sent up to this Court by the United States Circuit Court of Appeals for the Second Circuit, be advanced ~~and submitted~~ under the rules of this Court.

New York, March 3, 1898.

FLINT, EDDY & COMPANY,
by
WILHELMUS MYNDERSE,
Counsel.

SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1897.

FLINT, EDDY & CO, Respondents, Appellants, AGAINST GEORGE CHRISTALL and another, Libellants, Appellees.	No. 591.

8

Statement on motion to advance.

The certificate sent up herein by the Circuit Court of Appeals has been filed and docketed as No. 591 of October Term, 1897.

The libellants, trustees upon a bond for the payment of general average, to be stated and apportioned "in accordance with established usages and laws in similar cases," sued the respondents, signers of the bond and owners of cargo, for contribution in general average to a loss arising from sacrifices made by the owner of the vessel, consequent upon a stranding which occurred in course of a voyage from Trinidad to New York, through the negligent navigation of the master.

The question presented by the certificate is whether the 9
owner, having exercised the diligence specified in Section 3 of the Act of February 13, 1893, known as the Harter Act, is entitled to contribution in general average for such sacrifice.

The District Court held that he was so entitled, and a copy of its opinion is appended to the certificate.

It is desirable that the Circuit Court of Appeals should have this Court's early answer to the question certified, not only for its guidance in the particular case, but also because the subject is of general commercial importance. A like question arises in a considerable proportion of gen-

10 eral average losses, not only in this country, but also, by reason of the frequent adoption in bills of lading of a reference to the Harter Act, abroad; and in all such cases, the decision of this Court would be controlling.

Various other cases in this Court involving the construction and effect of the same section of the statute, and presenting questions related to though not decisive of those raised here, have been set down to be heard together, and have been or soon will be reached for argument.

Although this certificate was not issued in sufficient time to permit application for a hearing with such other cases, yet it is believed to be desirable that this case should be presented in advance of its regular order, so that the various questions which have arisen under Section 3 of
11 the Harter Act may be before the Court as nearly at the same time as may be, and that the commercial community may, at an early day, have the benefit of a decision of this Court comprehending the effect of said section in its various bearings.

NEW YORK, March 3, 1898.

Respectfully submitted,

WILHELMUS MYNDERSE,
Of Counsel for Appellants.

Supreme Court of the United States.

FLINT, EDDY & CO.,
Appellants,

AGAINST

GEORGE CHRISTALL AND JAMES GREIG AS TRUSTEES,
Libellants.

No. 591.
October Term,
1897.

BRIEF FOR APPELLANTS.

This action comes before the Supreme Court upon the following question certified by the Judges of the United States Circuit Court of Appeals for the Second Circuit:

> "If a vessel, seaworthy at the beginning of the "voyage, is afterwards stranded by the negligence "of her master, has the shipowner, who has exer- "cised due diligence to make his vessel in all re- "spects seaworthy, properly manned, equipped and "supplied, under the provisions of Section 3 of the "act of February 13, 1893, a right to general aver- "age contribution for sacrifices made and suffered "by him subsequent to the stranding, in successful "efforts to save vessel, freight and cargo?" (*Record*, *p.* 1).

The action is one of admiralty, and was instituted in the District Court of the United States for the Southern District of New York by the libellants, George Christall

and James Greig, as trustees, seeking contribution from the cargo in respect of certain alleged general average charges arising from the stranding of the steamer *Irrawaddy* in November, 1895, on the coast of New Jersey.

At the time of such stranding the *Irrawaddy* was bound from Trinidad to New York with a cargo which had been shipped to the appellants, Flint, Eddy & Co., and to other consignees.

By admissions upon the trial it appeared that the stranding of the steamer was due to the negligent navigation of her master, and that, up to the time of the stranding, she was properly manned, equipped and supplied, and was seaworthy.

These facts are recited in the certificate granted by the Circuit Court of Appeals (*Record, p.* 1).

The vessel was relieved from the strand by the jettison of a portion of her cargo, and through sacrifices and losses voluntarily made or incurred by the shipowner and through the services of salvors (*Record, p.* 1). The losses and sacrifices of the shipowner resulted from efforts to float the vessel by reversing her engines, whereby sand got in the machinery. Also some holes were cut in one of the bulkheads to permit the water to pass from one compartment to another (*Libel, Art.* 4; *Answer, Art.* 4).

The *Irrawaddy* completed her voyage and made delivery of her remaining cargo to the consignees in New York, upon their executing an average bond for the payment of all losses and expenses which should appear to be due from them as stated and apportioned by the adjusters "in accordance with established usages and laws in simi-" lar cases (*Record, p.* 1).

An adjustment was afterwards stated in New York which allowed, in the general average account, the compensation of the salvors, the sacrifices of cargo, and the losses and sacrifices of the shipowner.

Messrs. Flint, Eddy & Co. thereupon paid to the trustees under the average bond, the sum of $4,483.64, which was the full assessment upon their cargo in respect of the compensation of the salvors and the sacrifices of other cargo owners. They refused to pay the further sum of $508.29, charged against them in respect of sacrifices of

the shipowner (*Record, p.* 1), and the suit was instituted for the recovery of that item.

The District Court made a decree in favor of the libellants, from which decree an appeal was duly taken to the United States Circuit Court of Appeals.

Upon the appeal coming on to be heard that Court certified to this Court the above question of law, in respect of which they desire instruction.

The pleadings in the cause (*Record, pp.* 2-5) and the opinion of the District Judge (*Record, pp.* 6-12) are appended to the certificate.

POINTS.

First.

THE SHIPOWNER IS NOT ENTITLED TO CLAIM ANY ALLOWANCE IN RESPECT OF HIS ALLEGED SACRIFICES, BECAUSE OF THE FACT THAT THE STRANDING, TO RELIEVE WHICH THE SACRIFICES WERE MADE, WAS DUE TO THE FAULT AND NEGLIGENCE OF THE SHIPOWNER'S SERVANTS CHARGED WITH THE NAVIGATION OF THE STEAMER.

The primary rule may be stated that a shipowner who has, by his fault or by the fault of his servants, brought about a disaster, is not permitted to call upon the innocent sufferers in the calamity for contribution to the personal sacrifices or losses incurred or made by him to relieve the vessel and her cargo.

There is no question as to the existence of this rule; though there may be differences as to the reason for the rule.

(**a**.) Under one view it may be said that the sacrifices or losses of the shipowner are *not general average*.

(**b**.) Again, it may be said that the sacrifices *are* general average, but that the shipowner has forfeited his right to contribution by reason of his fault.

(c.) Under still another view it may be said that the sacrifices are general average, but that contribution may not be enforced by the shipowner, because he would be required ultimately to make good those same contributions to the persons from whom they were taken, under his obligation to respond in damages for negligent navigation.

This latter view rests practically upon a theory of the application of offsets.

The libellants contend that they are not bound by any rule which, for whatever reason, forbids them to seek contribution.

In making this contention they claim that the applicability of the rule is defeated by the fact that the ordinary contract of carriage has been limited by specific conditions. They point out that the shipowner has performed his obligations under the Harter Act, and it is admitted by the appellants that the owner of the *Irrawaddy* did in fact exercise due diligence to make his vessel seaworthy when she started on her voyage and that he maintained her in such condition up to the time of the stranding.

The Harter Act by its terms exempts the shipowner only from responsibility "for damage or loss resulting "from faults or errors in navigation."

The libellants claim, however, that the influence of the Act extends further, and that by necessary implication it authorizes the libellants, as trustees, to recover for the benefit of the owner of the *Irrawaddy* contributions from the cargo in respect of his alleged sacrifices.

The argument is that the shipowner, being exempt from responsibility for damage resulting from the faulty navigation of the master, is discharged not only in respect of physical injury to the goods, but also in respect of claims based upon general average contributions paid by the owners of cargo; and that, the shipowner being exempt from this latter class of claims, the rule which would debar him from seeking contribution in respect of his own sacrifices is no longer supported by reason.

I.—In considering this argument it becomes at once pertinent to seek the true reason why a shipowner, through whose legal fault disaster has arisen, has been debarred from seeking contribution in respect of his sacrifices.

The learned District Judge held:

> "There is no doubt, I think, that the liability to "indemnify the cargo owner is the *sole ground* "of the exclusion of the shipowner's claim to gen- "eral average compensation for his expenses in "rescuing the adventure from a peril caused by "bad navigation" (*Opinion, Record, p.* 8).

Starting with this premise he naturally and, indeed, quite inevitably, found that—

> "It therefore seems necessarily to follow that "in cases where all such liability is abolished by law, "as it is under the circumstances of this case by "the Harter Act, no such exclusion can be justi- "fied; and that where no such liability exists on "the part of the ship or her owner, his right to a "general average contribution from the cargo "arises necessarily by the same principles of equit- "able right that apply in ordinary cases of general "average" (*Record, p.* 8).

If the District Judge has erred in his premise that the liability of the shipowner to indemnify the cargo owner has been the "sole ground" for the exclusion of his claim to general average compensation in respect of his losses, the foundation of his opinion is gone, and his decision crumbles.

We very respectfully submit that he has erred upon this crucial question.

There is no unanimity among foreign nations as to the reason of the rule excluding the shipowner from the right to contribution. The question in each nation is generally determined by its code. Its code is, we may assume, the

outgrowth of its general law and indicates ordinarily the conclusions of its writers and of its Courts.

The following citations from European codes are, with few exceptions, taken from the appendix of Lowndes on Average, 4th Edition, 1888; and the translations of the author have been adopted, the purpose being merely to illustrate generally the status of the question among commercial nations at a stated time.

Neither the code of a foreign country nor the decisions of its Court are controlling here. The statute law or the judicial law of some of these countries may have been modified since Mr. Lowndes' work was published, but such circumstance, if it exists, does not affect our argument.

Our point is that the origin of the rule excluding the shipowner from contribution in respect of his losses does not support the premise upon which the learned Judge founds his decision.

ITALY:

Art. 643: "General average are extraordinary ex- "penses incurred and the damages voluntarily sustained "for the good and for the common safety of ship and "cargo. * * *

"*Not considered general average*, though incurred vol- "untarily for the common good and safety, are damage "suffered or expenses incurred by the ship when they "were occasioned by the defect or old age of the ship, or "by the fault or neglect of the captain or crew."

Code of Commerce, Title 7, *Chap.* 1; *Lowndes*, 439, 444.

HOLLAND:

Sec. 700: "When the inherent defect of the ship, her "unfitness to perform the voyage, or the fault or neglect "of the captain or crew has occasioned the damage or "expense, such damage or expense, although incurred "purposely, after due deliberation, and for the common "benefit of the ship and cargo, *is not general average.*"

Code, Book 2, *Chap.* II; *Lowndes*, 466-468.

GERMANY:

Art. 702: "All damage intentionally done to ship or "cargo, or both, by the master or by his orders, for the

" purpose of rescuing both from a common danger, " together with any further damage caused by such " measures, and also expenses incurred for the same pur- " pose, are general average."

Art. 704: " The application of the rules for general " average is not debarred by the fact that the danger has " been brought on through the fault of a third party, or " even of one of the parties interested.

" The party interested who is in fault, however, not " only can demand no compensation for any damage he " may himself have sustained, but is likewise answerable " to each contributor for the loss which the latter has " been put to through having to contribute, as general " average, to that damage."

Code of Commerce, Title 8, *Chap.* 1, *Arts.* 702, 704; *Lowndes*, 400, 401.

SWEDEN:

Sec. 122: " General average shall be admitted, although " the peril by which it has been occasioned may have been " caused by the master, owner, or goods proprietor, or the " act of which general average has been the consequence " may have been undertaken by the master without suffi- " cient motive; but an action for damages shall lie against " the party causing the average, and the average com- " pensation to which such party might otherwise have " been entitled shall be forfeited."

Scandinavian Code, *Lowndes*, 489.

FRANCE:

Sec. 400: " To general average belong, * * * and, " in general, damage voluntarily sustained and expenses " incurred after express deliberation, for the common " good and safety of the ship and cargo, from their load- " ing and departure to their arrival and discharge."

Sec. 405: " Damage done to the merchandise in conse- " quence of the master's having neglected to close the " hatches, to make the ship properly fast, or to provide " proper implements for hoisting; and *all other misfor- " tunes caused by carelessness of the master or crew, are " particular average*, for which the shipper has his re- " course on the master, the ship and the freight."

Code de Commerce, Title 11, *Secs.* 400, 405; *Lowndes*, 362–364, 366.

In explanation of the French Code, M. de Courcy, the president, and M. Sorel, the secretary of the Comite des Assureurs Maritimes de Paris, responded to certain inquiries of Mr. Lowndes as follows:

"Q. *Can there be a general average* when the danger "has arisen from unseaworthiness, the *fault of the cap-* "*tain*, or *vice propre* of the cargo?

"A. *No.* The expenses of putting into a port of refuge "in that case are chargeable against the party who has "occasioned it; and that party is also liable to an action "for damages on the part of those who have suffered loss "through the fault or the *vice propre*."

Lowndes on Average, 4th Ed., 379, *and the French cases cited.*

The French cases cited by the learned District Judge are scarcely pertinent to the discussion, and certainly are not in point to support the claim put forward on behalf of the owner of the *Irrawaddy*.

The case of *L'Amerique* (*Dalloz's Rep.*, 1878, 1, 479; *Sirey, Lois et Arrêts* 1878, 1, 292), related to the obligation of a cargo-owner to pay his proportionate share of the compensation of salvors, an obligation which has been recognized by Flint, Eddy & Co., who have paid voluntarily all charges incident to salvage and all charges arising from the losses and sacrifices of other cargo-owners, stopping only at the contribution claimed by the shipowner in respect of his own alleged losses and sacrifices.

So also the case of the *Alexander Lawrence* (10 *Rev. Int. du Droit Maritime*, 147) is in no closer accord. In that case fire occurred at sea through the negligence of the crew, and the vessel prudently sought a port of refuge. It was held that the exemption clauses of the charter did not suffice to relieve the shipowner from liability for the physical injury sustained by the cargo, and for such damage the steamer was condemned. It was further held that the terms of the charter did suffice to relieve the shipowner from sole responsibility for the expenses of the port of refuge, and that such expenses should be dis-

tributed as general average charges. The language of the Court is:

"Si en effet les dommages qui sont la conséquence d'une faute du capitaine ou de l'équipage sont en principe avaries particulières, l'armateur s'était dans l'espece exoneré de la responsibilité de ces sortes de fautes par une clause de la charte-partie dont l'arrêt attaqué a proclamé lui-même la validité et à laquelle il a donné effet."

"If, in fact, the damages which have resulted from a fault of the master or crew are in principle particular average, the shipowner was in this particular case exonerated from responsibility from such classes of faults by a clause of the charter-party which the judgment appealed from has itself declared valid, and to which it has given effect."

The particular phrase of the charter-party which worked the peculiar result appears to have been "*non garantie d'avaries.*" The shipowner, through the fault of his captain, was required to pay for the physical damage to the goods, but under the specific clause of the charter-party was enabled to collect the port of refuge expenses as general average charges.

Neither *L'Amerique* nor the *Alexander Lawrence* dispute or question the principle stated by M. de Courcy and M. Sorel (*supra, p.* 8).

NORWAY:

Sec. 72: "Even if the captain or crew have committed a fault for which they are responsible, the owner of the ship is not on that account deprived of his right to demand general average. In this, as in other cases, the penalty or damages that may be recovered from the captain or seamen is to be deducted from the sum apportioned as general average."

Lowndes, 501.

DENMARK:

The early law as set forth in the royal charter granted in 1850 to the Copenhagen Sea Assurance Company, provided by Section 29:

"If the cause of peril is attributable to the owner of the ship or to the misconduct of the master, the ship-

" owner *forfeits* his right to have his loss made good in " general average; the same rule refers to the owner of " the cargo under similar circumstances."

The later law and, as we understand, the existing law provides:

Sec. 192: "A distribution of damages in general aver- " age may take place although the danger which has " caused the losses may have arisen from somebody's " fault, but the guilty gets no compensation for damage " caused by himself. If the danger has been caused by " any fault or neglect for which the owner is responsible " under Section 10 he receives no compensation for the " damage which he sustains.

"If the captain, or whoever is acting for him, errs in " judgment with regard to the nature of the danger or the " choice of measures to avert it, the damage must then be " apportioned in general average, but the owner, unless " the measures which were taken can be regarded as ex- " cusable under the circumstances, loses any right to com- " pensation for damage which he has caused.

"He who thus *forfeits* a right to compensation, or is " compelled to contribute to the average, may make claim " against whoever is legally responsible for the damage."

Chapter 7; *Lowndes*, 527.

RUSSIA:

Sec. 1087: "If the captain has overcharged his vessel " beyond the load-water line: and if, in case of danger, " to save or lighten the vessel, he throws overboard a por- " tion or the whole of the merchandise, the goods thus " thrown overboard *are not considered as averages*, but " the captain and shipowner should pay the entire loss."

Lowndes, 548.

PORTUGAL:

Sec. 1817: " The following, though done voluntarily and " after deliberation for the good of ship and cargo, *shall* " *not be deemed general average;* expenses occasioned by " the inherent defect of the ship, by her unseaworthi- " ness, or by the fault or neglect of the captain or any " of the crew. All these are at the charge of the captain " or the ship."

Lowndes, 585.

SPAIN:

Sec. 810. "The owner of the thing that has caused the "expense or sustained the damage must bear the par- "ticular average."

Lowndes, 556.

ENGLAND:

In respect of the law of England Mr. Lowndes says:

"The broad principle may be laid down, then, that no "one can make a claim for general average contribution "if the danger, to avert which the sacrifice was made, "has arisen from the fault of the claimant, or some one "for whose acts the claimant has made himself, or is "made by law, responsible towards the co-contributors."

Lowndes on Average 4th Ed., 34.

He bases this rule upon the argument that the ship-owner engages with the shipper to furnish a seaworthy ship and to navigate her with care. If she falls into distress through unseaworthiness or through fault in navigation, the owner is bound by his contract of carriage to save the goods and to pay any damage done to them. If, therefore, he sacrifices his masts or his sails, or incurs expenses, he does so for his own good, and not for the general good.

Some relaxation of this rule is indicated by recent English decisions, the relaxation being induced by the special contracts of carriage affecting the cargo. In the case of *Strang* vs. *Scott*, decided by the House of Lords in 1889, the owner of jettisoned cargo sought contribution from ship and other cargo. Their Lordships declined to consider whether the rule of contribution in cases of jettison had its origin in an implied contract to contribute by those interested (*Wright* vs. *Marwood*, 7 *Q. B. D.*, 67), or whether it came from the old Rhodian laws, "not as a matter of contract, but in consequence of a "common danger, when natural justice requires that all "shall contribute for the loss of property which is sacri- "ficed by one" (*Burton* vs. *English*, 12 *Q. B. D.*, 20).

They did find that the vessel, the *Abington*, had fallen into distress through the faulty navigation of her master, and then, speaking by Lord WATSON, said:

"The fault of the master being matter of admission, it "seems clear upon authority that no contribution can be "recovered by the owners of the *Abington*, unless the "conditions ordinarily existing between the parties stand- "ing in that relation have been varied by special con- "tract between them and their shippers. But the negli- "gent navigation of the master cannot, in the opinion "of their Lordships, afford any pretext for depriving "those shippers whose goods were jettisoned of their "claim for general average contribution. They were not "privy to the master's fault, and were under no duty, "legal or moral, to make a gratuitous sacrifice of their "goods for the sake of others in order to avert the con- "sequences of his fault. The Rhodian law, which in that "respect is the law of England, bases the right of contri- "bution not upon the causes of the danger to the ship "and cargo, but upon its actual presence, and such ex- "ceptions as that recognized in *Schloss* vs. *Heriot* are in "truth limitations on the rule, which have been intro- "duced from equitable considerations in the case of actual "wrongdoers; or of those who are legally responsible for "them. The owners of goods thrown overboard having "been innocent of exposing the *Abington* and her cargo "to the sea peril which necessitated jettison, their equit- "able claim to be indemnified for the loss of their goods "is just as strong as if the peril had been wholly due to "the action of the winds and waves."

Strang vs. *Scott*, *L. R.*, 14 *App. Cas.*, 601, 609, 610.

Their Lordships declined to say what the effect would be upon claims advanced by a shipowner of clauses in the bill of lading exempting him from responsibility for the negligence of the navigators, there being no proof that all the *Abington's* bills of lading contained such clauses, and they added:

"But this is not a suit for recovery of contribution, and "the appellants, if it be necessary, will not be precluded "from substantiating their averments in the adjustment "of average claims" (*p.* 611).

A year later Sir JAMES HANNEN, President of the Probate Division, held that a shipowner might claim contribution in general average for sacrifices incurred in relieving a vessel and her cargo from

the consequences of negligent navigation when the shipowner was relieved by apt clauses in the bills of lading from responsibility for such negligence. His opinion is brief, and is expressly based on Lord WATSON'S suggestion in *Strang* v. *Scott*, that the rule forbidding the shipowner to seek contribution may be modified when the ordinary conditions between cargo and shipowner have been changed by express contract. He quotes this suggestion, and adds:

"Here it appears to me that the relation of the goods-
" owner to the shipowner has been altered by the con-
" tract; that the shipowner was not to be responsible for
" the negligence of his servants in the events which have
" happened. I, therefore, give judgment on the claim for
" general average."

The Carron Park, L. R. 15, *Prob. Div.*, 403.

The opinion of Sir JAMES HANNEN is peculiarly unsatisfactory, for the reason that he relies exclusively upon Lord WATSON'S dictum, while Lord WATSON, in the very case in which he delivered the dictum, held that the effect of a negligence clause in a bill of lading as affecting the shipowner's right to contribution was not before him in the case, and would not be passed upon.

The same question was referred to by Sir GORELL BARNES in 1893, but again collaterally.

The Mary Thomas, L. R., 1 *Prob. Div.* (1894), 108.

In that opinion the state of the law in Holland denying general average contributions to the owner of a vessel which has through negligence met disaster, even when the bills of lading contained the negligence clause, was recognized (*pp.* 113, 114, 116).

An earlier English case, and a better reasoned one than the *Carron Park*, denies to the shipowner the right to seek contribution. The steamer *Ettrick* in May, 1880, met with collision and was sunk. Her owner at once instituted an action to limit his liability, admitting in the action that the collision was due to the bad navigation of the *Ettrick*. He paid into court the £8 a ton which is the limitation fixed by the statutes of Great Britain. The *Ettrick* and

her cargo were then raised by the Conservators of the Thames. The expenses thereby incurred were paid by the shipowner, and the cargo was delivered to its owners under usual general average bonds. An adjustment being prepared, the shipowner brought suit against one of the consignees of cargo for contribution to these expenses. A special case was thereupon stated for the opinion of the Court, and questions were submitted whether the shipowner was entitled to any, or what, sum by way of general average contribution, salvage or otherwise, either against the cargo or the cargo owner or the fund in court. The Court of Appeal held unanimously that the shipowner could not have any relief, overruling expressly the contention of his counsel that, having paid into court his £8 per ton, he was purged of his liability as a wrongdoer and stood in the position of an innocent party.

The Ettrick, *L. R.*, 6 *Pro. Div.*, 127.

II.—In considering the possible effect of the Harter Act upon the libellants' claim for contribution, it is important to first ascertain what has been the true reason in the United States for denying to a shipowner contribution to sacrifices following a disaster arising from his servants' negligence. With Holland, Portugal, Italy and Russia holding unequivocally that such expenses are *not general average;* with France and Spain apparently relegating them to the column of particular average; with Germany and Sweden holding that the application of the ordinary rules of general average is not suspended by the negligence of any of the parties interested; with Denmark and the new Scandinavian code holding that negligence works a forfeiture of the shipowner's rights; with England alone holding through her courts, and with some uncertainty, that a shipowner is debarred from seeking contributions only because he would subsequently be required to pay them back, we come to the reason for the rule in the United States.

THE UNITED STATES:

We cannot find that it has been heretofore essential to the consideration of any case to determine accurately the

reason for the rule in this country, and there is, therefore, naturally found some looseness among writers and in judicial decisions.

We submit, however, that the soundest conclusion is that the subsequent sacrifices of a party whose negligent action, either personal or through his servants, has induced the peril are not general average. Neither equity nor natural justice suggests that contributions in respect of such sacrifices should be made by those who have been innocently involved in the disaster.

Mr. Parsons denies the right of contribution in respect of a jettisoned deck load on the ground that goods ought not to be carried on deck, saying: "If, then, being car-" ried there, they are jettisoned to save the ship and cargo " from impending peril, this loss gives no claim for con-" tribution." If the goods were improperly on deck, he imposes responsibility for the destruction of the goods upon the shipowner.

Parsons on Shipping, Vol. 1, *pp.* 353, 357.

Again he holds (*p.* 411) that

" where a jettison is justified by the circumstances under " which it takes place, and these circumstances were " caused by the fault of the master or by his want of care " or skill, the jettison would give no claim for contribu-" tion."

He reaches the same conclusion respecting sacrifices attributable to the original unseaworthiness of the vessel.

Parsons on Shipping, Vol. 1., *p.* 411.

He simply holds that such losses are not general average. He does not deny contribution upon any theory of offsets or accounts.

Mr. Gourlie says:

" If the necessity for the general average act arises from " the unseaworthiness of the vessel, the *vice propre* of the " cargo or the negligence or barratry of the master or " crew, no contribution generally would be due. If the " danger and the necessary sacrifices are produced by the " fault of the vessel or captain—and the vessel appears as " a claimant for contribution—it would seem a proper

" answer that he by whose neglect the loss had been pro-
" duced should bear it without relief."

Gourlie on General Average, 15. *See also the cases cited.*

The position taken by this author is purely equitable.

Mr. Lowndes accepts Mr. Gourlie's statement as embodying the law of the United States.

Lowndes on Average, 4th Ed., Appendix O, p. 608.

It has been adopted, also, by Judge BROWN, in the Eastern District of Michigan.

The Ontario, 37 *Fed. Rep.*, 222.

The District Judge for the Southern District of New York in 1889 intimated that the foundation of the rule might be one of offset, but did not express a conclusion upon that point; nor was a conclusion necessary for a decision of the case.

Ralli vs. *Troop*, 37 *Fed. Rep.*, 888, 890.

At that time the seed was apparently planted in his mind, which finally bore fruit in the decree now under appeal.

In the case of *The Schiedam*, the same Court again referred to the question incidentally, dismissing the claim of the shipowner, however, upon the ground that the sacrifice was not contemplated and not voluntary.

Van den Toorn vs. *Leeming*, 70 *Fed. Rep.*, 251.

In the *City of Para* the same Court sustained a claim for contribution among cargo owners, although the stranding out of which the sacrifice arose was negligent, apparently upon the authority of *Strang* vs *Scott*. There was no claim of the shipowners directly involved, nor any question of their exemption from liability.

Pacific Mail S. S. Co. vs. *N. Y. H. & R. Mining Co.*, 69 *Fed. Rep.*, 414.

The Circuit Court of Appeals, in that case, sustained, " upon the ground of equitable right," the claims of cargo

owners *inter sese* for contribution in general average, placing the decision expressly upon the authority of *Strang* vs. *Scott*.

Pacific Mail S. S. Co. vs. *N. Y. H. & R. Mining Co.*, 74 *Fed. Rep*, 564, 567.

They say, however:

"It is true that the owner of the vessel cannot claim "contribution, and is liable, also, for indemnity to the "cargo which has been sacrificed" (*p.* 567).

The Supreme Court has held strictly to the rule charging upon the shipowner the losses resulting from an unjustifiable sacrfice or a sacrifice rendered necessary by earlier negligence.

Lawrence vs. *Minturn*, 17 *How.*, 392.
Dupont vs. *Vance*, 19 *How.*, 162, 166.
The Portsmouth, 9 *Wall.*, 682.
Ralli vs. *Troop*, 157 *U. S.*, 386.

III.—Is the rule changed by the operation of the Harter Act?

The authority upon which the libellants rely to support such change is the decision in the English case of the *Carron Park*, a decision not based upon any disclosed line of reasoning—a decision based, moreover, upon a *voluntary* and *valid* agreement in respect of the carriage of goods between the shipper and shipowner, relieving the shipowner from the consequences of his servants' negligence, and not affected by the Harter Act in any way.

Assuming for the moment that the decision in the case of the *Carron Park* was sound upon the circumstances of that case, does the exemption given to the shipowner by the Harter Act effect the same result as did a voluntary and valid agreement in the bill of lading made by the shipper relieving the ship owner from his servants' negligence? The statute is one exempting shipowners from certain responsibilities to shippers which had theretofore rested upon them, and it should be strictly construed. It limits and varies the pol-

icy of the national law as declared by the Courts. By its terms it relieves the shipowner from responsibility for "damage or loss resulting from faults or errors in naviga- "tion," and THAT IS AS FAR AS IT GOES. It does not declare that the shipowner himself shall have a right to recover contribution for sacrifices or expenses incurred by him after the occurrence of the disaster for the purpose of completing his contract of transportation.

It affects only the contract for transportation. It does not effect, or purport to effect, the relation of ship and cargo under the law of general average.

When the *Irrawaddy* stranded it became the owner's interest and duty to relieve his vessel and her cargo from the position of danger, and to do everything possible to effect, not merely the safety of the cargo, but its transportation to destination.

The Portsmouth, 9 *Wall.*, 682, 687.

For expenses so incurred he has, under the primary law of general average, no right to seek contribution; and, no such right being given to him explicitly by the terms of the Harter Act, he cannot enforce such contribution upon the ground that he has been exempted by the statute from responsibility to his cargo for its physical damages.

The difference between the law of Great Britain and that of the United States in the matter of the shipowner's obligation to repair and refit his vessel and to forward the cargo to destination (*Atwood* vs. *Sellar*, *L. R.*, *Q. B. D.*, 342, 358, 359) affords of itself sufficient ground to distinguish the present case from such authority as *The Carron Park* presents.

While the question of the influence of the Harter Act upon the shipowner's claim for contributions has not heretofore been before the courts of the United States for adjudication, it has been considered by ex-Judge CHOATE, sitting as arbitrator respecting disputes arising under a general average adjustment of the steamer *Glendower*.

Fire broke out in the bunkers of the *Glendower* May 30, 1894, while she was lying at New Orleans loading cargo for an outward voyage. Water was applied and

the fire was extinguished. The cargo was necessarily discharged, but the coals were retained on board. From time to time thereafter fire again appeared in the bunkers, so that on June 20th surveyors recommended that the bunker coals be discharged and new coals supplied. The coals in which the fire had appeared were of a character liable to spontaneous combustion when confined in a damp and hot place. In an adjustment certain losses incident to holding the coals in the bunkers and to finally discharging and selling them were objected to, and as to those items the arbitration was made. The cargo which had been taken on board was unloaded on June 4th, and was subsequently forwarded by other vessels, the voyage of the *Glendower* being broken up. There was a question whether the master was negligent in not immediately discharging the coals when the fire first broke out. It was contended on the part of the steamer that it was immaterial whether or not the master was negligent, as the provisions of the Harter Act relieved the shipowner from liability, and consequently entitled him to claim contributions.

Judge CHOATE held, however, that the Harter Act had no application in the administration of the law of general average, and that the question of the master's negligence must be determined as a fact. He said:

"In the next place, was the subsequent loss attributable to the negligence of the master or shipowner?

"I assume that, if it were, the ship could not recover contribution against the cargo, and this without any regard to the provisions of the Harter Act. The doctrine of general average does not rest upon the contract of affreightment or the question whether as between the ship and the cargo there can be a recovery under that contract. There may be an exemption from the liability either under the contract or by force of statute, and this will not prevent the cargo from maintaining its general average claim against the ship (*Heye* vs. *North German Lloyd*, 33 *Fed. Rep.*, 60; s. c., 36 *Fed. Rep.*, 705; *Schmidt* vs. *Royal Mail Co.*, 45 *L. J. Q. B.*], 646).

"Besides, the present is not a question whether the ship shall contribute its share of the loss of cargo, but whether the cargo should contribute its share to a loss by the ship, and the Harter Act has no relation whatsoever to such question."

The shipowner's claim was sustained, therefore, not because of the operation of the Harter Act, but because upon the proofs the master was free from negligence.

V.—The owner of the *Irrawaddy* seeks on a broader scale the relief which was denied to the owner of the *Ettrick* in the English courts (*L. R.*, 6 *Pro. Div.*, 123).

The owner of the *Ettrick* argued that, because his liability to cargo was limited to £8 per ton, he, having met that liability by depositing the amount in court, was free to seek contribution in respect of the losses and expenses incurred by him of a general average character.

The owner of the *Irrawaddy* practically says that, because he is freed from liability to pay to the cargo owner any damages resulting from the negligent navigation of his vessel, he is logically entitled to claim from the cargo owner contribution in respect of his personal sacrifices.

Lord Jessel said:

"The ground upon which the shipowner puts his claim "is this: he says that the payment of £8 per ton not only "prevents his being answerable in damages for any more, "but is equivalent to saying that he shall be in exactly "the same position as if no negligence had been com- "mitted, and nothing had been done by him or by his "agents that would give rise to any liability. But I can- "not read the act so. All that it says is that he shall not "be answerable in damages for any greater amount. It "does not make his acts right if they were previously "wrongful. It does not give him any new rights as far "as I can see, and it appears to me that if the owner of "a vessel and cargo, which by the default of him or his "agent had been sunk in collision, after paying £8, had "raised the vessel and cargo (and it was not a case where "£8 a ton was more than the damage done to the cargo), "he would not have any right to the whole of the cargo, "or that having raised the vessel for his own benefit, if "he or his agent had been the cause of sinking the vessel, "he would thereby be entitled to salvage on the cargo, or "to general average, or to anything in the nature of "general average. It seems to me he would have no such "right, for the statute does not destroy the effect of all "that had been done, as it simply diminishes or limits "the liability in damages. If that is so, of course there "is an end of the case."

The Ettrick, *L. R.*, 6 *Pro. Div.*, 127, 133.

The claims of the two shipowners are alike in spirit and in logic; but just as the Court of Appeal in England held that the Act of Parliament limiting the liability of the owner to £8 per ton gave the shipowner no other rights, so, we submit, our courts should hold that the Harter Act is to be construed strictly and that it gives to the shipowner nothing beyond the generous measure of relief explicitly vouchsafed.

While there has been no direct authoritative adjudication in this country as to the effect of the Harter Act upon a shipowner's claim for contribution, the counter proposition that a shipowner is relieved by the Harter Act from the payment of general average contributions due to the cargo has been expressly met and overthrown.

The Roanoke, 59 *Fed. Rep.*, 161.

The Court, in determining the effect of the Harter Act, limited it purely to the contract of transportation.

Distinction was drawn between the law regulating the contract of carriage and the law regulating the distribution of general average charges.

The Court said:

"This general average contribution is not dependent "upon contract, but is 'built upon the plainest principles "'of justice' (3 *Kent Comm.*, 233), and is aside from con- "tract (*The Eagle*, 8 *Wall.*, 23). 'It is the safety of the "'property and not of the voyage which constitutes the "'true foundation of general average' (*Insurance Co.* v. "*Ashby*, 13 *Pet.*, 331). The vessel is made to contribute, "as well as the cargo saved, not because of its undertak- "ing to carry, or out of any duty as carrier, but because "it had encountered peril, and had been saved to the "owners by a sacrifice of other property.

"It therefore appears that the adoption of this statute, "which is now invoked to relieve the vessel from contri- "bution, found in force these well-known rules in no re- "spect dependent upon each other and of separate origin— "the one from the common law and the other from the "maritime law. That from the common law was harsh, "imposing upon the contract of carriage an absolute in- "surance against loss by fire, and clearly within the leg- "islative view for relief; the other, for general average, "was an ancient rule of the highest equity, not touching "that contract, but applicable only to an emergency of

"great peril to the whole adventure—a rule of mutual "benefit and value, protecting vessel and cargo when peril "arose. The statute makes no mention of general aver- "age. The legislative intent was clear to relieve the carrier "from the onerous contract liability for the encouragement "of vessel interests, and that intent furnishes the key to "the meaning of the statute, unless its language is so "broad and unmistakable that it cannot be limited to that "purpose."

The Roanoke, 59 *Fed. Rep.*, 163, 164.

The reach of the Harter Act has been defined in two other cases, and in both decisions the effect of the act has been confined strictly to the contract of carriage between the owner of the cargo and the carrying vessel.

The Delaware, 161 *U. S.*, 459, 470.
The Niagara, 77 *Fed. Rep.*, 329, 334.

In the first of these cases it was held that the act did not affect the respective rights and liabilities of the owners of two colliding vessels.

In the second case, which arose from a collision due to the mutual fault of the *Niagara* and the *William Hales*, it was held that the measure of responsibility of a colliding vessel to the owners of the carrying vessel and its cargo was not in the aggregate diminished, although the Harter Act would effect, as between the carrying vessel and its cargo, a modification in the previous rules of distribution of the recovery.

Second.

THE QUESTION CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS TO THIS COURT SHOULD BE ANSWERED IN THE NEGATIVE.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Appellants.

WILHELMUS MYNDERSE,
Advocate.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 591.

FLINT, EDDY & COMPANY.
Appellants.

against

GEORGE CRISTALL and JAMES GREIG,
as Trustees.
Appellees.

On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF FACTS AND QUESTION.

These sufficiently appear in the very concise statement contained in the certificate, as follows:

A decree in favor of the libellants for $636.70, for general average contribution, interest and costs, having been made by the District Court of the United States for the Southern District of New York, and an appeal having been taken therefrom to this Court, and the cause having come on for hearing, a question of law arose concerning which this Court desires instructions of the Supreme Court of the United States for

its decision. The facts out of which the question arose are as follows:

On November 9, 1895, the British steamship Irrawaddy, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped and supplied and was seaworthy.

The vessel was relieved from the strand November 20th as the result of sacrifices by jettison of a portion of her cargo, and of sacrifices and losses voluntarily made or incurred by the ship owners through the master and of the services of salvors.

The Irrawaddy then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo, and the losses and sacrifices of the ship owner.

The respondent thereupon paid $4,483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the ship owner, which they refused to pay.

The District Court made a decree in favor of the libellants; from which decree the respondent duly appealed to this Court.

Upon these facts the Court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy,

properly manned, equipped and supplied, under the provisions of Section 3 of the Act of February 13th, 1895, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo ?

The question upon which the opinion of this Court is thus desired, involves a consideration of the interpretation and effect to be given to the Act of Congress of February 13, 1893, commonly called "The Horton Act" (Stat. at Large, Vol. 27, chap. 105, p.), and is in short this: Does the act by *abrogating the liability* theretofore imposed by general law upon a ship and its owners for the faults of its officers and crew, *create a right* on the part of such owners, which they would not otherwise enjoy, to recover general a average contribution for a sacrifice made by the ship to rescue the common enterprise from a peril, not of the sea, but caused by the fault of the master ?

POINTS.

First Point.--The Harter Act, when interpreted according to the ordinary meaning of its language, does nothing more than to exempt the ship owner from liability to others. It gives him no *right* which he did not previously have.

1. "To be *held responsible* for damage or loss resulting from faults or errors in navigation or in the management of said vessel," etc., manifestly refers to that liability which requires a

reimbursement to others of losses sustained by them in consequence of any of the causes mentioned. The entire command of the statute is fully obeyed by a refusal to enforce any such liability.

Second Point.--The question therefore, whether the Harter Act should have an effect beyond and in addition to that indicated by the natural import of its language, depends upon the answer to be given to the question, whether, upon the approved doctrines of statutory interpretation, its language should be extended beyond the ordinary meaning of its words. This question should be answered in the negative.

1. As a pure matter of abstract right and justice, (if there be such a thing as pure abstract right and justice, that is to say, right and justice considered as something entirely apart from the well-being of society) one man should not, aside from contract, be held liable for the negligence or misconduct of his servants or agents. Every man should be charged with responsibility for his own acts, and for those alone.

2. In jurisprudence, however, such abstract right and justice have no place. The only right and justice recognized and enforced by it are determined by a reference to those standards and rules which have been built up upon the basis of the actual usages and customs of men, and upon a consideration of what is best for the interests of society. There are some of these rules, the observance of which is so necessary, under all conditions, that they are everywhere recognized among civilized societies, and it is these which represent our notions of natural equity

and justice. They are so ancient and universal, and have, consequently, become so familiar to men that they appear to have a foundation in human nature itself, and are for that reason, called *natural justice*. They are not the special creations of statutory law, but are ascertained and declared by the public authorities who exercise the judicial function.

3. Of these general rules there is none more conspicuous and all-pervading than that by which a man becomes liable for the acts or neglects of his agents and servants. He is made so liable by his *contracts*, even without express words. If one contracts to do a thing for another, any agents whom he may employ in the performance of his contract must, of course, exhibit the skill and diligence requisite to the performance of the engagement; but this form of liability for the acts of others embraces, comparatively, but a narrow region only. Its broader field of operation is where the principal is made liable to *third persons*, with whom he is under no contractual relations, under the doctrine expressed by the familiar maxim *respondeat superior*. This means that whenever one person is acting as agent or servant for another, the principal, or master, is liable for any injury caused by his acts or neglects. The guilt and wrong of the agent or servant are thus *imputed*, and become, so far as legal consequences are concerned, the guilt or wrong of the principal or master. There is hardly any rule of law more universal or more important than this. A principal cannot rid himself of this imputed fault by showing that he was careful in his selection of his agents or servants. The experience of mankind was not long in discovering that this, if allowed, would leave a poor reliance

for security against negligence, and would render the remedies of sufferers from negligence ineffective in consequence of the circumstance that the only persons against whom redress could be so sought were incapable of affording it.

4. The possible consequences of this law are very weighty. A single negligent act on the part of one person may strip another, wholly innocent of guilt, of all his property.

5. This universal rule has been, in many states, partially supplanted by what has been aptly styled a "singular legislation which permits "owners and masters to do mischief with "ships at a cheaper rate than is permitted to "other people, or with other instruments." The motive leading to this legislation appears in each instance to have been the same.

(*a.*) By ancient maritime codes, as adopted by most of the Continental nations of Europe, the owner of a ship was exempted from personal responsibility for loss occasioned by the negligent navigation or mismanagement of the officers or crew; the ship itself, however, remaining liable. The effect of this was to *limit* the risk of the ship owner. This policy was adopted in order to encourage the building and employment of ships, and was a part of the special policy of maritime states.

(*b.*) The same policy was subsequently adopted, from the same motive, in England, and carried out through the instrumentality of various statutes, limiting, though not abrogating, the responsibility of ship owners.

(*c.*) It was adopted by the United States also, for the like reason, by a statute enacted by Congress in 1851, in like manner limiting liability of ship owners, and thus the law of the United States was brought into near accordance with the rule of the Continental law.

(*d.*) The particular statute under consideration (Statutes at Large, Vol. 27, Chap. 105, Feb. 13, 1893) is, in some respects, of a similar character, but is very peculiar. As originally proposed, it would seem to have been sought for by those interested in opposing the numerous attempts made by ship owners to incorporate into bills of lading clauses relieving them from responsibility; but the movement seems to have been captured by the ship owners themselves, and made the instrumentality of securing very important additional exemptions. This was done by procuring the introduction of the third section of the act. This section provides in substance that where ship owners have used due diligence in making the ship seaworthy at the commencement of the voyage, they shall be relieved from all liability "resulting from faults or errors in navigation, or in the management of said vessel." This is a further invasion of the general rule above referred to, sought for the benefit of the same interest, and yielded to, we must infer, from the same motive with that which prompted the prior departures.

6. None of these statutory changes have in any manner abrogated, or changed, the universal *principle* resting upon broad foundations of justice, which imputes the faults and negli-

gence of an agent or servant to his principal or master. Indeed, it is never the effect of a statute to change *principles*. Principles exist in the nature of things, and are ascertained by science. It is not within the compass of legislative, or other power, to alter them. They are indestructible. Statutes may change, or abrogate, their *legal consequences*, but they cannot alter, and do not purport to alter, the principles themselves. Statutes are *commands*, and are to be obeyed to the letter, whether they are right or wrong. They may be, and often are, wholly wrong, but the circumstance that they are so is quite immaterial to courts. They are to be carried into effect none the less.

As a matter of *principle*, therefore, it is just as true now as before the statute was enacted that the fault of the master or crew in the navigation of a vessel is the fault of the ship owner. What the statute has done, and all that it has done, is to abrogate *one* of the *consequences* of that principle. It has commanded that "neither the vessel nor her owner or owners, agent or charterers shall become, or be held, liable for damage or loss resulting from faults or errors in navigation, or in the management of said vessel." This simply forbids the courts from entertaining any action, or proceeding, seeking to enforce any such responsibility, and does nothing more.

7. The principle then remaining, all its consequences remain, except so far as they are displaced by the statute. One of the consequences of the principle is that the ship owner cannot recover in general average for a sacrifice occasioned by a fault in navigation. This consequence has not been abolished by the statute. There is no language employed to that effect.

8. The foregoing observations express both the

fundamental rule of statutory construction and the reason on which it is founded. They enjoin that statutes, the effect of which is to limit the operation of the general principles of natural right and practice, that is to say, to derogate from the common law, should be strictly construed.

9. The grounds and reasons which support the view of strict construction in cases like the present, will further appear upon an inquiry concerning the guarantees we have for the correctness and utility of the general principles of the unwritten law, as compared with those furnished by statutory law.

The unwritten law is built up by the gradual contributions from age to age of the conclusions of learned courts, reached after thorough discussion by competent experts concerning what is right or wrong, expedient or inexpedient, in particular cases. The validity of each conclusion is subjected to frequent subsequent examination, and any errors which may have been committed are thereby likely to be discovered and rejected. The guarantees thus afforded that the final conclusions are in accordance with fundamental truth and justice can hardly be exceeded. In no one of the moral sciences are final conclusions subjected to so severe a test. The practical wisdom of mankind has recognized the value of a system of rules thus constituted. The great bulk of all the private transactions of men are, by common consent, regulated and governed by the principles thus established.

Statutory law, on the other hand, is a widely different thing. It is not enacted by experts, nor is it preceded by anything in the way of inquiry and examination which is to be com-

pared in thoroughness with the method pursued by the unwritten law. Moreover, it is often moulded by selfish aims and artful practices. Its inherent inferiority as a guide for the regulation of human transactions is fully confessed by the very limited extent to which it is resorted to. Legislators themselves are entirely conscious of the impolicy of substituting it to any considerable extent in place of the unwritten law.

To the courts is entrusted the function of preserving and maintaining the body of jurisprudence relative to private transactions as the best possible foundation for the administration of justice between man and man. They should never surrender any part of that body of scientific truth, except in accordance with the clear command of the legislature. It may justly be considered as the injunction of the legislature itself that its own action in changing the law should be thus strictly limited.

10. This line of reasoning has frequently received the approval of the highest authorities.

In the case of the China (7 Wall., 53), the question arose as to whether the Pilot Act of New York, which established a system of what was regarded as compulsory pilotage, relieved the vessel and its owners from the consequences of a collision occasioned by the fault of the licensed pilot. The argument on behalf of the ship owners was that the imputation to them of the fault of their servants depended upon the circumstances that they had the choosing of such servants, and, consequently, that if the choice were taken away from them, as it was by the act in question, the liability should also be taken away. There were some English decisions in accordance with this view,

but their correctness had been challenged by eminent English judges. This Court did not accept the argument thus urged in behalf of the ship. It placed the responsibility of the vessel, in such cases, upon the principle of natural right, founded upon the consideration of the necessity of securing diligence in the navigation of the vessel, and of having a party of sufficient responsibility who could be made answerable for the faults of those in charge. It refused to surrender these principles of right where the plain language of the statute did not require it. It deduced the following proposition as the result of the best authorities (p. 63).

"The statute giving immunity where a licensed pilot is employed abridges the natural right of the injured party to compensation, and is therefore to be construed strictly."

A similar question arising upon British statutes had been considered by Sir Robert Philimore in the case of the Halley (Law Rep., 1868, 2 Ad & Ecc., 3). He referred, in his opinion, to prior English decisions to the effect that the responsibility of the owner under the compulsory pilot law ceased. He did not undertake to disregard those decisions, for the case did not require it. The collision, which was the subject of consideration, took place in Belgian waters, and its consequences therefore were to be governed by Belgian law, which did not give immunity to the ship owner; but he frankly express his disapproval of the doctrine, saying:

"But the considerations of domestic policy, which have created this pecular law, are not founded on principles of universal law or natural justice. They are considerations of British policy which apply to British waters

and territory; but not to Flushing waters in which this collision took place. * * Lord Stowell's mind, furnished as it was with the principles of jurisprudence, rejected the argument for the immunity of the wrong doing vessel. * * * I will frankly say that it appears to me difficult to reconcile the claims of natural justice to the law which exempts the owner who has a licensed pilot on board from all the liabilities for injuries done by the bad navigation of the ship to the property of an innocent owner. * * * * No one acquainted with the working of this law which exempts the wrong doer from liability in this Court can be ignorant that it is fruitful of injustice."

The opinion of Lord Stowell, referred to by Sir Robt. Philimore, was delivered in the case of the Neptune the Second (1 Dodson, 467).

The obligation resting upon the courts to sustain the general principles established by jurisprudence, and, to that end, to construe with strictness any legislation which affects them, was subsequently recognized by this Court in the case of Sherlock *vs.* Alling (93 U. S., 99). This also was a case of collision when a licensed pilot was in charge, Mr. Justice Field, pronouncing the opinion of the Court, said (p. 106):

"The occasions upon which a pilot or engineer would be able to respond to any considerable amount would be exceptional. The statute of England, which exempts the owners of vessels and the vessels from liabilily for faults of pilots—pilotage there being compulsory and pilots being licensed—has not met with much commendation from the admiralty courts, and the general ten-

dency of their adjudications has been to construe the exemptions with great strictness. This course of decision is very fully stated in the exposition of the law made by Mr. Justice Swayne, in the case of The China (7 Wall, 53), where this Court declined to hold that compulsory pilotage relieved the vessel from liability. In the case of The Halley (Law Rep., 2 Adm. & Ecc., 15), decided as recently as 1867, Sir Robert Philimore strongly questioned the policy of the statute, and said that it appeared to him difficult to reconcile the claims of natural justice with the law which exempted the owner who had a licensed pilot on board from liability for the injuries done by the bad navigation of his vessel to the property of an innocent owner; and observed that no one acquainted with the working of the law could be ignorant that it was fruitful in injustice. The doctrine that the owners are responsible for the acts of their agents and employees ought not to be discarded, because the selection of a pilot by the owner is limited to those who, by the State, have been found by examination to possess the requisite knowledge of the difficulties of local navigation and the requisite skill to conduct a vessel through them."

Other authorities are to the same effect, Gale *vs.* Laurie, (5 B. & C., 156), Attorney Gen. *vs.* Cuse (3 Price, 303), The Protector (1 W. Rob., 45).

These authorities clearly point out the duties of courts in interpreting and giving effect to statutes which limit or displace the operation of fundamental principles. They are to consider the wisdom and policy of such statutes. This course implies no criticism upon the

action of the legislature. The command of that body is to be fully obeyed, but the question is: What is the extent of the command? Shall we, to whom the legislature entrusts the guardianship and preservation of the fundamental principles of right and justice, inquire whether the legislature may not possibly have intended more than it has said, or shall we, while loyally executing its commands, treat those commands as limited by the ordinary meaning of the language employed? The statement of this question suggests the proper answer to it.

Fourth Point.—The learned District Judge, in his carefully prepared opinion, reached a contrary conclusion in this wise: he assumes that the refusal of the maritime law to allow a recovery in general average by the ship owner, where the necessity for the sacrifice has been occasioned by a fault in navigation, *arises from, and is dependent upon*, the liability of the ship owner for the negligence of the master and crew, and that this liability having been taken away by the statute, whatever depends upon it must also fall. It is respectfully submitted that this reasoning is quite erroneous.

1. The fault does not lie in the drawing of the conclusion, but in the assumption upon which is based. It is true that in carrying out the command of the statute which takes away the *liability* everything wholly *dependent* upon that liability must be deemed also to fall; but the refusal to allow the ship owner to recover in the case supposed does not depend upon his

liability. That refusal and his liability alike depend upon another and the same thing, namely, that universal *principle* which imputes the fault of the servant or agent to the master or principal. The reason why the law refuses to allow the ship owner to recover, where the master or crew have been in fault, is that such a recovery would not be consistent with the principle of justice above mentioned. The law of general average gives its benefit only to those who are innocent, and equally innocent, of the fault. On principle, the ship owner is chargeable with the consequences of the disaster, and ought not to be permitted to shift any burden imposed by it from himself to those who are innocent. On principle, too, he should be compelled to reimburse the others for their entire loss. The statute has, indeed, abrogated the latter consequence of the principle, but not the former.

2. The fallacy, it is respectfully submitted, into which the learned judge has fallen is that the relieving of a person, by statute, of *one* of the consequences of guilt has rendered him *innocent*, which is by no means true.

The only safety in determining the effect of statutes which restrict the operation of general principles is to treat the principles as still remaining unaffected, and limiting the relief from their operation afforded by the statute to that called for by the language itself of the statute.

The moment we indulge the fallacy that statutes deal with *principles* and furnish a new basis upon which a new system of principle may be constructed, we encounter the risk of error. This is not the function of statutory law. If statutes operated upon principles, what would

be true as principle in England might be false in America; or what was true in Massachusetts might be false in New York. Upon such notions the law would cease to be a science. That part of the law which is built up by judicial decision rests upon right reason, and the actual usages of men and is truly scientific, and is the same everywhere. It was of this part of the law that Cicero spoke when he said: "Non alia lex Romae, alia Athenis, alia nunc, alia posthac."

3. It was evidently a consideration influencing the learned judge, that the statute would not be made consistent with itself if it were held to abrogate a responsibility of the ship owner for errors of navigation, and yet refused him the right of recovery of a general average contribution; but whether the legislation is consistent or not is no proper concern of a court. Where, indeed the language of a statute is doubtful, it may be interpreted so as to secure consistency; but this is for the reason that an interpretation which makes the legislation consistent is presumably that which the legislature intended, if it be as well justified by the language employed as another which would render its action inconsistent. But in truth, there is no inconsistency at all. In all cases where a legislature may contemplate some limition of a common law liability in order to accomplish some special end, the question may arise how far the proposed limitation should be carried. The ancient maritime law exempted the owner from all personal liability, but still left the vessel liable. Modern statutes in Great Britain and this country have effected somewhat similar limitations. Consistency did not require the legislature in either case to leave

the liability fully existing, or to abrogate it altogether, It might well, as it did, deem it the part of wisdom to relieve the ship owner of a part of his liability. The legislature proceeds upon grounds essentially arbitrary. These are the only ground upon which a legislature can proceed. The notion that it ever attempts to develop a scientific system, or that it could succeed in such an attempt, were it to make it, would be a mistaken view. If the question were deliberately put to a legislature, whether in abrogating the responsibility of the owners for errors in navigation, it would go still further and give them the right of recovery in general average, it might well be decided—and indeed best decided—that it should not proceed so far as to allow that right of recovery. It might well be said that the ship owner was sufficiently protected in relieving him from responsibility to others for losses, and that it would be wise to still leave in operation any other inducements which might lead him to the exercise of care.

4. The learned Judge in the court below deems his conclusion to be supported by the doctrine declared by Sir James Hannon in the case of The Carron Park (Law Rep. 15, Prob. Div. 403) and by some Continental authorities, although they are not unanimous, that where the owners are relieved by clauses in the bills of lading from liability for the faults of the master or crew, they may recover, a contribution in general average; and he goes so far as to say that the argument that the Harter act should be strictly construed "might have been urged *more plausibly*" as to the effect and intent of these *contractual* exemptions of the owners, (Record, p. 9). But can the learned Judge mean that *contracts* are subject to

the same rule of strict construction as statutes in derogation of common right? Surely this has never been heard before.

The rule of strict construction applies only to statutes, and, as already shown, is founded on the consideration that outside of the statute there is an existing body of *law* composed of wise and just precepts which should not be changed except in obedience to the clear and positive command of the sovereign, who can change it if he wishes. No such condition exists in the case of *contracts*, The sole office of interpretation *there* is to find out the *intent*, and to this end the meaning of words may be enlarged in any way short of perversion. It may be fairly argued that where a principal is relieved by *contract* from responsibility for the negligence of his servant, he is, *as between the parties to that contract*, made *innocent*, in all respects, of such negligence, and if so, he would have the same rights as other innocent persons. Where the owners of cargo *agree* with a ship owner that he shall be liable in no respect for the faults of the master or crew, they take upon themselves, *for a consideration*, the consequences of such faults; and they and the ship owner stand upon the same ground so far as those faults are concerned. Under such circumstances it might very properly be argued that a setting up, by the owner of cargo, of the fault of the master against a claim by the ship owner for a general average contribution was against the fair meaning of the contract.

But the case where the legislature, by an arbitrary statute in derogation of the general principles of right and *against the will* of the cargo-owner, takes away from the latter the right of recovery against the ship owner for damages sustained by the fault of the master, and this only, the case is very different. The

just rule of construction in such a case requires us to say that every right of the cargo-owner which is not plainly taken away is left.

LASTLY.—The question certified by the Court of Appeal should be answered in the negative.

JAMES C. CARTER,
Of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

FLINT, EDDY & COMPANY,
Appellant,

AGAINST

GEORGE CHRISTALL and another,
Appellees.

No. 591.

On certificate from the United States circuit court of appeals for the second circuit.

BRIEF FOR THE APPELLEES.

This certificate from the court below raises a question of general average arising from a negligent stranding of the steamship *Irrawaddy*. The shipowner had furnished a seaworthy ship, which stranded by the master's fault on November 9th, 1895, since the Harter act came into operation. She was finally floated as a result of general average sacrifices made and incurred by the shipowners, through the acts of the master and the services of salvors.

After delivery of cargo on signing general average bonds, all the general average charges were adjusted and a portion paid by the cargo, leaving in dispute the assessment for the shipowners' sacrifices. On an admiralty suit being brought, the Honorable Addison Brown held that by the Harter act the shipowners were absolved from faults or errors of the master in navigation of the ship, and therefore entitled to recover contribution in general average for sacrifices growing out of a stranding due to such fault of the master. (82 Fed. Reporter, 472.)

The respondent appealed to the circuit court of appeals. That court thereupon asks :

"If a vessel seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the shipowner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and sup-

plied, under the provisions of section 3 of the act of February 13th, 1893, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding in successful efforts to save vessel, freight and cargo?"

By order of this court made March 14, 1898, this cause was advanced as under the thirty-second rule, to be submitted on printed briefs on or before April 11th.

The argument in favor of an affirmative answer to the question is:

The Harter act has freed the shipowner from responsibility for faults in navigation.

In case of a seaworthy vessel this exoneration is complete.

Where previously the shipowner could not have general average contribution, if his servants' faults had induced the peril, this exclusion was because these faults were then imputed to the shipowner.

Obviously a shipowner, bound to make good all consequences of a loss, could not call on the owners of the cargo to bear any part of his own ultimate burden.

Abolishing the shipowner's liability for faults in navigation applies to all relations between ship and cargo, and not merely to suits *against* vessel or owners.

This change of relation brings to the former conditions of general average the maxim—cessante ratione cessat lex.

A negligence clause releasing the shipowner' liability for faults in navigation in Europe allows the owner to recover general average, although the peril may be induced by fault of his servants, because of this discharge by contract from that liability, otherwise imputed to the shipowner.

A multo fortiori if the previous liability of the shipowner be abolished by Congress, quia potentior lex quam pactum.

The Harter act, in this respect, gives shipowners the advantages and immunities which foreign courts allow to be secured by contract—and this was the declared intent of Congress.

The learned counsel for appellant questions these propositions. The underlying grounds and conditions of general average are challenged, and the theory of such contribution is to be investigated. It seems also to be maintained that this

statutory change in the relations between vessel and cargo—this relief of the vessel from faults in navigation—has left the law of general average quite unaffected.

The consequences that flow from the liability of the shipowner to the cargo for faults of his servants are clear; and the new results from removing that liability are, I submit, equally clear.

It is now asked why the shipowner was debarred from contribution when fault brought on the peril—an inquiry carrying us to the sources of this branch of the law. The attention of this court is invited first to the historical side of the controversy, then to the state of contemporary European jurisprudence in 1893, the purpose of congress, the construction of the statute, and some consequences suggested, should the appellants' view prevail.

I.—General average arising from the faults of the master and crew under the Roman law and mediæval commentators.

The compilers of the Digest of Justinian placed the subject of general average in close relation to the law of liability of the shipowner for the acts of his servants. The title, De lege Rhodia de jactu, follows next after the rubric, De exercitoria actione. Under this first head—the action against shipowners for the acts of the master which are imputed to the principal—there is no trace of limit upon the full liability of the owner. The edict of Ulpian allowed a sure remedy for such faults in navigation as gave ground for the actio in exercitorem. It made no difference whether the shipmaster were bond or free, a minor or of legal age, because the tortious acts of the master were to be *imputed* to the owner who had appointed him—sibi imputaturo qui præposuit.

Dig. L., 14, 1, 1, § 4.

Having thus established a rule of absolute liability for such imputed fault, the next title, dealing with general average, treated of perils and sacrifices, based on the assumption that faults of the ship's servants carried with them a right of full

recompense from the principal. The Roman lawyers put *restitution* before *contribution*.

The possibility that the personal remedy against the owner might be ineffective through his insolvency, and a consequent failure to make good the damage caused by his servants, apparently was not considered.

The Digest contains no direct provision excluding from general average any consequence of neglect of a master or fault of the crew, since the actio in exercitorem was deemed a complete remedy for such a case.

Such has been the understanding of commentators. Vinnius in 1647 published a learned and authoritative edition of Peckius' treatise, Ad rem nauticam. He there discussed such neglects of the master and owners as were then common. These were overloading, wrongful stowage on deck, insufficient equipment, and failure to take a qualified pilot in entering a difficult port.

All these faults, he says, are ascribed to the master and owners, and therefore they do not form the basis of any general contribution, as the master is bound to make good all such damage.

"Culpæ magistri adscribitur, si navem plus æquo oneraverit, aut perperam positis mercibus in foris aut acatio *op den overloop off inde boot* & ideo si ob hanc causam factum fieri necesse fuerit, aut armamenta cædi, id detrimentum non sarcitur communi contributione mercium, sed ad solum magistrum exercitorem & navem pertinet. * * * *

In culpa quoque magister est, si ubi necessitas id exigit, aut fert consuetudo, non adhibuit peritum loci nautam *een lootsman off pilote*, cujus ductu evitatis brevibus aut saxis latentibus navis in portum agatur. Quod si neglexerit singulis vicibus multatur quinquaginta aureis realiis ; et præterea si quid damni ob hanc causam mercatores senserint, id omne sarcire tenetur."

Peckii Ad rem nauticam commentarii, quibus nunc accedunt notæ Arnoldi Vinnii (ed. Laurentius, Amsterdam, 1668), p. 236.

Loccennius, who wrote in Sweden, in 1651, a treatise, De jure maritimo et navali, also stated a similar reason for excluding such claims from general contribution.

"Si jactum fieri necesse sit, quod magister navem plus æquo oneravit aut perperam collocavit merces in foris, hoc detrimentum non sarcietur communi contributione, sed ad exercitorem et magistrum navis pro rata pertinebit. arg. l. 27, §§

25 D. ad leg. Aquil. l. 30 §2 D. locat. Grot. introd. jur. H. 3, 20, Vinn. ad Peck, 226. solius vero exercitoris damnum erit si ejus voluntate et periculo merces foris imposuerit magister navis." Liber II, Cap. VIII, § XIV ed. Heineccius p. 1005 (1740).

The citation from Grotius is from his Introduction to the Laws of Holland, written in the year 1620, during his imprisonment in the Castle of Louvestein, but not published until after his escape. It is thus given by his English translator:

"If the throwing overboard, stranding, cutting away, or other damage occurs in consequence of the master having overloaded the vessel, or improperly loaded it, as on the deck, or in the boat, or otherwise; *it would come entirely to the charge of the master and his owners, and the ship*, and is not brought into the average against the merchandize."

Introduction to Dutch Jurisprudence, trans. by Herbert, Book III, Chap. XXIX, Sect. 14, p. 417, London, 1845.

In 1698, John Voet also stated this liability for bad stowage where a jettison is afterwards made:

"Sed si ob id, quod plus justo navis onerata fuit, vel merces male collocatae in transtro forte au scapâ, vel alteri navigio deteriori ignorante mercium domino impositae, jacturâ vel aliter, obortâ tempestate perierint aut corruptae fuerint, de damnis hisce magister tenebitur."

Commentarius ad pandectas, vol. I., p. 694, (1726).

This question of fault by carriers of cargo was early defined by the Italian commercial lawyers. Straccha, in 1553, made a long enumeration of the faults of mariners. At that time, exactly as now, a deviation from the proper route made the carrier liable for subsequent casualties, even if pirates plundered the cargo. After such a deviation, the mariner was answerable for a jettison in a storm, which otherwise would have been a ground of general average contribution.

"Culpa etiam nautae adscribitur qui recta navigatione contempta littora devia sectatur; si enim ex eo quod solito itinere

non est usus merces perierint, vel quia forsan à piratis deprædatae, vel tempestatae jactus factus est, nauta tenetur."

Straccha De Nautis, pars 3 § 6, in Tractatus de mercatura seu mercatore (Venice, 1553).

This responsibility for fault was not limited to acts of the carrier. Anyone whose conduct brought a culpable damage to the adventure was liable. In times when piracy and capture were the chief sea perils, and merchant vessels depended on their speed for safety, it was held a grave fault to hinder a ship. This is traced especially through the fragments of the Greek laws.

Art. 56 of the Synopsis Minor of the Basilicas provides:

"If any one shall impede the ship and shall cause those in the ship to suffer damage either by pirates, that is, incur arrestments, commonly called captures, or by fire or other peril, he shall restore the damage who made the impediment."

1 Pardessus, 204.

In the compilation known as the Laws of the Rhodians, the authenticity of which is doubted, this provision appears amplified so that it expressly mentions the case of either merchant or part owner who impedes the ships.

Ius et leges Rhodiorum, § 28; in Vinnius appendix, p. 29.

The responsibility for faults was mutual. Cargo as well as ship was answerable.

"Si nauclerus una cum nautis negligens fuerit et damnum vel naufragium acciderit, idem nauclerus ac nautae mercatori ad praestationem damni tenentur. Si culpa *mercatoris* perire navim cum onere contingerit, *mercator* et naufragii et navis damnum agnoscat."

Kurike, Jus maritimum Hanseaticum, p. 788 (ed. Heineccius, 1740.)

Marquardus, of Lübec, in a treatise on mercantile law, published in 1662, declared this principle of full restitution for goods jettisoned through consequences of the faults of the master and crew.

"Planè si in culpa extiterit nauta, nec solertem satis oporam navaverit, nisi fatalis illa vis obstiterit; cum nihil adeò fortui-

torum capax quam mare; nec quisquam proinde adeò iniquus ut sceleri adsignet, quod venti ac fluctus deliquerint. *Tacit. 14 annal. in pr.* in restitutionem integræ jacturae et deteriorationis mercium condemnabitur." Tractatus politico-juridicus de jure mercatoria (ed. Francofurti 1662), p. 393.

Thus Weytsen in his Tractatus de averiis, which appeared in Amsterdam in 1672 stated that the consequences of negligence did not come into contribution.

"Similiter in collationem non venit, *quod per incuriam*, aut caeteroqui tempestate oborta è navi delabitur." §7.

Van Leewen observes in his note to this:

"Quod, si culpa, aut negligentia magistri sociorumve navalium fiat, mercatori magister resarcire debebit."

In Casaregis Opera, Vol. III., p. 10, ed. Venice, 1790.

Casaregis, a judge in Genoa, who made a special study of general average, about 1720 thus stated the principle of disallowing contribution for the results of negligence:

Etenim quemadmodum certissima juris regula est, quod si aliquod malum, aut adversum navi, et mercibus acciderit ob ignorantium, negligentiam, aut aliam culpam magistri navis, *non modo Avariam ille petere nequeat*, sed etiam obligetur ad reficienda damna ob hanc causam allata dominis navis et mercium.

De Commercio, Discursus, CXXII, Vol. 2, p. 4 (ed. Venice, 1790).

The *reason* why the owner and the master could not recover general average contribution was not left in doubt. It was explicitly stated.

Having examined the facts in a particular case and decided that the master could not have contribution (nedum contributionem exigere non poterit a mercatoribus), Casaregis gave the reason as follows:

"Ratio inter alias est, quia cum ipse mercedem pro mercibus vehendis recipiat, jure merito tenetur ad omne damnum, quod ex sui negligentia vel culpa mercibus eveniret."

Disc. XIX., Vol. 1, p. 53.

Bynkershoek (1673–1743) expounded with his usual clearness and accuracy the logical reasoning which excludes a jettison by fault of the mariner. First, he puts the question, and then quotes the Plaacæt, or Ordinance of Philip II. of 1563,* that if the ship had been wrongly loaded, the jettison would be to the cost of the mariner, "and is not brought into any average." "Which," says Bynkershoek, "I should understand thus, that this would take place (*i. e.*, refusal of contribution) only when the owner of the things jettisoned can recover the jettison from the mariner. Otherwise, if I judge aright, it is to be contributed for by all. *This rests on the principle that the mariner is answerable only for his fault* (Ut solus nauta culpam præstet, rationem habet); if, however, he be less competent, still the doctrine of jettison requires contribution, because it is made for the common safety."

"Rursus quæritur, an contributioni locus sit, si quid jactum vel dejectum sit, quod culpa nautæ male onerata esset navis? & ajunt § 8. Tit. IV. LL. Philippi II. & § 8. L.I.T. XXIV LL. Fris. solius nautæ damno id futurum, *en niet gebragt werden in eenige avarye.* Quod ita intelligerem, ut tunc demum locum haberet, ubi jacturum rerum dominus a nauta jacturam consequi posset, alioquin, si recte arbitror, ab omnibus contribuendum est. Ut solus nauta culpam suam præstet, rationem habet, sed si minus sit idoneus, quia pro salute communi jactum est, jactus ratio contributionem desiderat." Quæstiones juris privati, Book IV. cap 25, p. 729 (ed. 1744).

This doctrine that a contribution in general average was required to do full justice, was also stated by Wedderkop, a Danish author, who wrote in 1757. His Introductio in jus nauticam, a treatise of received authority, dealt with general average, and neglects of the master, as follows:

"In case the master has overloaded his ship without the privity of his shippers and has been compelled to jettison cargo, the owners may make reclamation against the master and shipowner; but if they are not indemnified they will have an action for contribution against those whose effects have been thereby saved, reserving to them a recourse against the master (jactarum dominis a reliquis bonis quæ jactui istiusmodi suam debent conservationem, fiat contributio, salvo priori casu contra nauclerum regressu)."

Wedderkop, Introductio in jus nauticam, p. 162.

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*In 4 Pardessus, pp. 64, 82.

It appears that a like interpretation was given to a Hamburg statute which excluded cases of overloading from general average. In practice it became usual to allow a remedy against the master, but not to deprive the cargo of contribution (sondern die Contribution in Havariegrosse doch gestattet, und nur ein Regress gegen den Schiffer gegeben).

Kaltenborn, Grundsätze des Europäischen Seerechts, vol 2, p. 76, note (Berlin, 1851).

Accordingly in 1851, Kalkenborn thus stated the general rule, that the first requisite of general average was a common danger—and that it made no difference if this danger arose from a personal fault.

Dabei ist es gewiss, obgleich namentlich die älteren Seerechte zum Theil anderer Meinung sind, für gleichgültig zu halten, ob die Gefahr durch die Schuld jemandes herbeigeführt sei oder nicht. Die Havariegrosse und die Contribution des Schadens nach deren eigenthümlichen Grundsätzen wird in dem einen, wie in dem andern Falle stattfinden dürfen. Dagegen versteht es sich von selbst, dass der durch seine Schuld die Gefahr Herbeiführende zur Verantwortung und zur vollen Entschädigung herangezogen werden dürfe.
Kaltenborn, vol 2, p. 76.

Hence it is certain—though some of the older maritime laws held a different view—that it is regarded as immaterial whether or not the danger was induced by some one's fault.

General average and contribution for the damage, according to their peculiar principles, will take place in the one case as in the other.

However, it goes without saying, that he, through whose fault the peril has been brought about, should be held to liability and to make full restitution.

This brief review is sufficient to trace the origin and reason of the rule excluding contribution, where the peril arose from negligence. The view first followed was strictly practical. With a liability of the shipowner to answer *in toto* for the fault of his servants, why could *he* distribute and lay on others any part of his own ultimate burdens? This exclusion of any contribution was absolute, so long as the ship owner's responsibility for his servants' faults remained absolute.

After the shipowner had succeeded in having his liability limited to the value of his ship, the courts soon saw a possibility of a failure of complete remedy. The next step was to allow general average to innocent cargo in cases of perils arising from negligence, leaving an ultimate resort to the owner, or to the culpable *rem*.

II.—The treatment in modern commercial codes of general average arising from faults.

Since 1860, the question has been so often discussed that codification after that time has provided expressly for such adjustments, reserving an ultimate remedy against the wrongdoer, or the principal who may be answerable for the fault.

The Norwegian Sea Law of 1860 provided by § 72:

"Even if the captain or crew have committed a fault for which they are responsible, the owner of the ship is not on that account deprived of his right to have general average. In this as in other cases the indemnity or damages that may be recovered from the captain or seamen is to be deducted from the sum apportioned as general average; if there is a difficulty in recovering it, the adjustment of the average is not to be delayed, but the amount recovered subsequently is to be refunded to those who have overpaid."

The German commercial code has dealt clearly with this point:

"Art. 704. The application of the rules for general average is not excluded by the fact that the danger has been occasioned by the fault of a third party, or even one of the parties interested in the adventure (dass die Gefahr in Folge des Verschuldens eines Dritten, oder auch eines Betheiligsten herbeigeführt ist). The party interested who is *in fault*, however, cannot demand compensation on account of any damage which is thereby sustained, but even is answerable to each contributor for the loss which he suffered through such damage being apportioned in general average. Should the danger have arisen through the fault of one of the crew, the owner is likewise answerable for the consequences, subject to the conditions of Articles 451 and 452."

The commission for this codification in their deliberations

said of the doctrine that excluded general average where the *ship* was primarily at fault:

"This view seems principally intended for the case when the operation of the average only concerns the shipowner. However, it would be highly unjust when the results of the average affect also the cargo interests; for example, after entering a port of distress, a part of the cargo is sold to pay repairs and expenses—if in such case one of the cargo interests whose goods had been sold were to have no claim for indemnity on his co-shippers if his lien on the vessel should be afterwards lost by its destruction before arrival at destination."

It appears that the above article was unanimously adopted.

Protokolle, Vol. VI., p. 2688, 2689.

Ulrich, in his treatise on general average, says:

"The German code allows neither the existence, nor the operation, of general average to cease when the danger is culpable—it matters not whether produced by the acts of an outside third party or through one of the participants."

Ulrich, Grosse Haverei, p. 11 (Berlin, 1884).

A later writer also says:

"It is immaterial to what circumstance the source of the peril is to be ascribed. It may arise from natural occurrences *or by human fault* (durch menschliches Verschulden.)"

Schroeder, Die grosse Haverei, pp. 44, 45 (Berlin, 1894).

The Swedish law of February, 1864, Art. 144, provided:

"It is a general average although the peril by which it has been occasioned arises from the master, the shipowner, or one of the cargo owners, or if the master's act from which the average resulted was without sufficient ground; but a right of action for indemnity is allowed against the one who caused the damage, and he is deprived of any action for contribution which he would have been entitled to."

Art. 135 of the maritime code of Finland, promulgated in 1874, provides:

"It is general average, although the danger which occasioned it has been caused by the fault of the master, the shipowner or cargo-owner or the master has taken the steps

which resulted in the damage without sufficient ground, but the one at fault loses not only his rights of indemnity, but further, is responsible to the parties in interest for the damage and losses."

In 1872 a commission was appointed by the Danish Government for the preparation of a new maritime code. In 1882 their first report was issued. In 1890, delegates from the three Scandinavian countries were chosen for a conference, with a view to obtain uniformity. In 1892, twenty years since this first beginning, their code was adopted by Denmark and immediately ratified by Sweden in 1892, and took effect in Norway on 1st of January, 1894.

Art. 191 of this code states:

"The circumstance that the sacrifice was rendered necessary in consequence of an error of judgment or neglect of either master or crew, or any other person on board, does not prevent the damages sustained from being brought into account as general average items; but the person who caused the damage cannot claim compensation for any loss he may have sustained himself owing to the average accident. If the danger, to which the vessel was exposed, was attributed either to the master, *or anyone else, for whom the owner is responsible*, the latter has no claim for compenation for the loss he sustains."

The French code of commerce, enacted in 1808, followed the Ordonnance of 1861 and by Art. 405 provided:

"The damages happening to the cargo by fault of the master, not having closed firmly the hatches, moored the vessel, supplied good tackle, and by all other accidents proceeding from the negligence of the master or company, are also particular averages, to be borne by the cargo owner, but for which he has his recourse against the master, ship and freight."

The precise effect of this article has been much discussed. The text writers are divided whether this covers voluntary sacrifices.

In 1891 the steamship *Wildcroft*, having an insufficient supply of fuel, burned her fittings, and finally reached port after burning some 2,000 bags of her cargo. The consignees of the burned cargo claimed a general average in their behalf, and the master disputed any fault on part of the vessel. The

tribunal of commerce of Marseilles decided that the master and owners were both to blame for the running short of coals. On the point of the consignee's right to a general contribution the judgment said, after declaring the ship's primary fault :

"Que cette faute, ne pouvant être reprochée aux consignataires, retomberait cependant sur eux, s'il leur était également interdit quand leur marchandise a été sacrifiée et brûlée dans l'intérêt commun, de se faire indemniser dans un règlement d'avaries communes ;

"Que le refus de ce droit aboutirait à une véritable iniquité, en laissant le consignataire en face d'un capitaine fautif et d'un armateur responsable, insolvables peut-être, ou difficiles à poursuivre et à atteindre ; en laissant sans aucun risque de ce genre les consignataires qui ont profité du sacrifice et reçu à cause même de ce sacrifice l'intégralité de leurs marchandises."

"That this fault, not to be laid to the consignees, would still fall upon them should they also be equally prohibited, when their goods had been sacrified and burned in the common interest, from indemnifying themselves by an adjustment of general average;

"That the denial of this right would produce a real injustice in leaving the consignee in face of a master, negligent, and an owner, liable, but possibly insolvent, or difficult to follow and reach, and leaving without such risk those consignees who had gained by the sacrifice, and through the same sacrifice had received their own consignment entire."

Upon an appeal to the court of appeal at Aix, that Court said, in August, 1892, after holding the master and owner at fault :

" Considérant que notre législation, nullement différente, en la matière, de celle de la plupart des autres nations civilisées n'en fournit heureusement pas d'autre que celle qu'ils ont très équitablement adoptée, et que le paragraphe final de l'article 400 du code de commerce trouve ici sa juste et naturelle application ;

Considérant, en effet, que,

Considering that in this respect our law, no different from that of most civilized nations, fortunately has not provided anything divergent from what they have most equitably adopted, and that the last paragraph of article 400 of the code of commerce finds here its just and natural application ;

Considering that the act

dans l'évênement qui occasionne le procès se rencontrent au plus haut degré tous les caractères essentiels de l'avarie commune à savoir: le sacrifice voluntaire motivé par un péril imminent, accompli en vue du salut commun et ayant produit le résultat souhaité;

Qu'il n'importe, comme l'a expressément jugé la chambre civile de la Cour de cassation, par son arrêt de rejet du 2 avril, 1878, que la cause première qui a ultérieurement rendu nécessaire la dépense faite simultanément pour le bien du navire et de la marchandise doive être attribuée non à une fortune de mer mais à une faute commise par le capitaine;

Que sans doute cette faute rendrait celui ci irrecevable à demander le règlement d'une avarie commune que son impéritie a nécessitée, et produirait le même effet à l'égard de son armateur à moins qu'il ne se fût affranchi de la responsabilité lui incombant du chef de son préposé mais qu'elle ne saurait mettre obstacle au droit des chargeurs, seules victimes du dommage ainsi souffert de réclamer eux-mêmes ce règlement.

Dalloz, 1894, 2, 565.

which occasioned the proceeding has in a high degree the essential characteristics of general average, namely the voluntary sacrifice caused by imminent peril, performed with a view to the common safety and having produced the desired result;

That, as was expressly held by the civil chamber of the Court of cassation by decision of dismissal of April 2, 1878, it is immaterial that the primary cause which ultimately rendered necessary the outlay that was made alike for the good of ship and cargo should be ascribed, not to accidents of the sea, but to the master's fault;

That without doubt this fault prevents him from demanding an adjustment of general average which his unskillfulness has caused, and produces the same effect on the owner, *unless he has relieved himself from liability on account of acts of his agent*, but this would form no obstacle to the right of the shippers—the only victims of the damage sustained—to themselves demand an adjustment.

An appeal was taken on behalf of the steamship to the court of cassation, which affirmed the above decision, without, however, expressly discussing this right of general average among the cargo interests. Dalloz, 93, 1, 408.

Although the Italian code follows the French in excluding from general average damage arising from accidents which

proceed from neglect of the master and crew (Codice di commercio, art. 646, sub. 7), it is also recognized by authorities that a sacrifice made for the general safety does not lose its general average character, because the emergency requiring the sacrifice may arise from the fault of one of the parties.

" Ma la colpa di uno fra gli interessati o di un terzo può mettere la nave e il carico in condizione tale che si debba ricorrere a un sacrificio per il bene e la salvezza di entrambi. E a questo riguardo noi vedemmo a suo tempo come l'avaria non perda il carattere di commune per questo che il pericolo, che si evitò col sacrificio, sia stato suscitato da colpa di qualcuno degli interessati o di un terzo. Ma osservammo pure pur che se la cosa sacrificata appartine a colui che è in colpa, questi non può spiegare un'azione verso gli altri, per ottenere il rimedio della contribuzione, per il motivo che tutte le quote di questa dovrebbero in definitiva andare a esclusivo di lui carico."

"But the fault of one of those interested or of a third party may place the vessel and the cargo in such a condition that it is necessary to resort to a sacrifice for the good and safety of both. And in regard to this we have seen how the average does not lose the character of general, because of the fact that the danger which is avoided by the sacrifice, has been caused by the fault of some of those interested, or of a third party. But we observed also that if the thing sacrificed belongs to the person who is in fault he cannot maintain an action against the others to obtain the remedy of contribution *for the reason that all the parts of this contribution must finally be borne exclusively by him.*"

Belingieri, Della Avarie e della Contribuzione, Torino, 1883, p. 190.

The solution of this question by the Antwerp Congress of 1885, was:

" 22 Les règles relative á l'avarie commune doivent s'appliquer même lorsque le danger cause primordiale du sacrifice ou de la dépense été amené soit par la faute du capitaine de equipage, ou d'une personne intéressée au chargement, soit par le vice propre du navire, ou de la

The rules respecting general average should have the same application when the danger which is the original cause of the sacrifice or the outlay has been induced either by the fault of the master or the crew or of a person interested in the cargo, or by the inherent vice of ship or cargo.

marchandise. Le recours que donne faute ou le vice propre doit être independant du rég lement de l'avarie commune."

The remedy which is given by the fault or defect should be independent of the adjustment of general average.

5 Valroger, Droit Maritime, 405.

The circuit court of appeals for the second circuit held before the Harter act, that cargo could recover general average in case of sacrifices caused by a negligent stranding.

Judge Shipman said:

"The law of the sea, which first established the doctrine of general average, placed itself upon the equitable principle that those who put the property which they separately owned to the hazards of a common peril should bear proportionally the losses which an innocent owner had endured by the sacrifices of his property in successfully saving the other owners from the common dangers; and *therefore* it did not allow the owner of the vessel or cargo, who was in fault, and who produced the calamity, by himself or by his agent, to share in the contributions from the other sufferers. * * *

But the fact that the vessel was in fault presents no equitable reason for preventing the cargo owner from his right of contribution from the owners of the saved cargo, and gives them no just reason for refusing to contribute. When the calamity which was initiated by the fault of the master is imminent, it is his duty to take measures to overcome his mistake, and, if necessary, he has the power of sacrificing a portion of the cargo to save the residue; but his previous fault does not impair the cargo owner's equitable right to receive compensation, if his sacrifice has saved the property of others."

Pacific Mail *v.* Mining Co., 74 F. R., 565, 567.

The learned district Judge has summarised the provisions of these codes, and the theory of general average, in a generalization that can hardly be abridged or modified, and I therefore venture to quote it in full:

"All the maritime codes that exclude the shipowner from reimbursement in general average for the ship's fault, make him liable to cargo owners for the master's bad navigation. This exclusion is based on his *liability to the cargo owner*, which logically and necessarily excludes the shipowner's claim to contributions in two ways: First, because the obligation to indemnify would require the shipowner at once to restore to the cargo owner as damages whatever he might collect from

him as general average; second, because the same obligation makes the shipowner's claim to contribution incompatible in its inception with the fundamental conditions of a general average claim, viz., that there must be, (1) a sacrifice, (2) a sacrifice voluntarily incurred, (3) a sacrifice incurred for the common benefit. But when the ship, through the master's fault, is legally responsible for all loss and damage, her expenses in rescuing the cargo from the peril which that fault has brought about cannot possibly be treated as a sacrifice, since such expenses are nothing more than the performance of a legal obligation; for the same reason they are not voluntarily incurred, in the legal sense, since the ship is legally bound to make the rescue and bear all the expense of it, or else pay the increased damages from omitting to do so; and so the expenses of rescuing the cargo are not ultimately for the cargo's benefit, but for the pecuniary benefit of the ship, in diminishing as much as possible the cargo damages, for which the ship's liability is already fixed by reason of her fault. Thus the ship's liability for all the loss and damage arising from her fault, *whenever this liability arises*, necessarily excludes any equitable claim by her owner to an average contribution from the cargo, because the legal conditions of such a claim cannot in such a case exist; and because, if allowed, any such contribution must be at once repaid to the cargo owner as damages." (Record, pp. 7, 8.)

III.—The effect of negligence clauses upon the owner's right to contribution in general average.

As the basis of refusing contribution was the owner's liability for the acts of his servants, when this responsibility had been contracted away, the owner became entitled to full contribution. Being no longer answerable for the faults in navigation which had before been imputed to him, he was left free to enforce contribution for general average sacrifices.

Such negligence clauses have only been in vogue about twenty years. Their effect, for general average purposes, is to put the exonerated faults in navigation on a level with sea perils.

One of the first cases was that of the French steamship *Amérique*, which was abandoned at sea in an alarm because of an open port—an act of gross negligence of her officers and crew. Salvors afterwards picked her up as a derelict and

brought her into Plymouth. The vessel and cargo were subjected to heavy salvage charges. (The *Amérique*, 2 Aspinall's Maritime Cases, N. S., 460.) Subsequently these were stated in general average, and a suit was brought in France by the shipowner to recover the cargo's proportion. The cargo interests naturally claimed in defense that all the sacrifices and losses arose from the neglect of the officers of the ship—which under the old form of contract would have been a valid defense. The company, however, had inserted in these bills of lading a clause of exemption for such faults of their servants.

The court of cassation held that the owner could therefore recover general average contribution, because the company "était licitement exonérée de la responsabilité des ses sortes de fautes par la convention."

Dalloz, 1878, 1, 479, 489.

This decision modified the previous jurisprudence of France, which up to 1870 had not recognized any right to distribute in general average any consequence of a loss occurring through negligence.

Valroger says of the present jurisprudence:

"Malgré la faute du capitaine, le propriétaire du navire peut exercer une action en contribution contre les chargeurs si, dans ses rapports avec les chargeurs, il s'est affiranchi de la faute du capitaine."

Droit Maritime, vol. 2, p. 30.

Nevertheless, Mr. Lowndes, in the last edition of his work on general average (1888) continued to print without modification a statement sent to him by M. de Courcey and M. Sorel, of the Comité des Assureurs Maritimes of Paris, a proposition which later decisions have made very misleading.

"Q. Can there be a general average when the danger has arisen from unseaworthiness, the fault of the captain, or *vice propre* of the cargo?

"A. No. The expenses of putting into a port of refuge in that case are chargeable against the party who has occasioned it; and that party is also liable to an action for damages on the part of those who have suffered loss through the fault or the *vice propre*."

Lowndes on Average, 4th Ed., 379.

The French decisions cited as supporting this text are between 1856 and 1863, and are obviously superseded by the adjudication above cited of the court of cassation in 1878.

On June 12, 1894, the court of cassation again had a negligence clause in the contract. The general average was for bearing away at sea for a port of refuge because of a fire on shipboard, which was due to the negligence and imprudence of the officers and crew. The court held that although, in the absence of such a clause, such expenses would be particular average to be borne only by the ship, they were here properly recoverable as general average. The action was by Crowley, master against Saint-Freres, owners of cargo.

Attendu d'autre part, qu'il n'importe que le changement de route, la relâche, et les frais qu'ils ont occasionnés doivent être attribués non à une fortune de mer, mais, d'après la cour de Douai, à un fait imputable à Crowley; que si, en effet, les dommages qui sont la conséquence d'une faute du capitaine ou de l'équipage sont, en principe, avaries particulières, l'armateur s'était dans l'espèce exonéré de la responsabilité de ces sortes de fautes par une clause de la charte-partie, dont l'arrêt attaqué a proclamé lui-même la validité et à laquelle il a donné effet;

Whereas on the other hand it is immaterial that the change of voyage, the putting into port and the expenses which were thereby occasioned should be attributed, not to a peril of the sea, but according to the court of Douai to an act imputable to Crowley [the master] as even if the damages resulting from a fault of the master or crew are in principle particular average, in the case at bar the shipowner had been exonerated from liability for faults of this kind by a clause of the charter party, of which the decree appealed from has declared the validity, and to which it has given effect.

Attendu dès lors que les dépenses causées par la relâche de l'*Alexander Lawrence* à l'île Maurice devaient être classées en avaries communes.

Whereas therefore the expenses caused by the *Alexander Lawrence* putting into the island of Mauritius should be considered as general average.

Dalloz, 1895, part 1, pp. 41–44.

Also reported Revue int. du droit maritime, vol. 10, p. 147.

On February 6, 1895, in case of Oriental Steamship Co., against Genestal, the court of cassation repeated almost the

words of the above decision, where a collision was shown to have been caused by the negligence of the master, from which the bill of lading absolved the owner. The charges claimed included putting into a port of distress, with the expenses for temporary repairs and other outlays incurred by the owner to restore the ship so that the voyage could be resumed. The court again held that the exoneration in the contract required such sacrifices and outlays to be contributed for as general average, reserving to the cargo a recourse against the master.

Dalloz, 1895, Part 1, pp. 399-400.

In the case of the *Carron Park*, 15 P. D., 203, 207, Lord Hannen said that the negligence of the crew, for which the shipowner is not responsible,

"is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner, and the expenditure or sacrifice made by him is not made to avert a loss from himself alone, but from the cargo owner."

See also Strang *v.* Scott, 14 Ap. Cas., 601.

In the Liverpool Conference of 1890, which revised the York-Antwerp rules of general average, it was proposed to embody this principle in the new set of rules. It was thus formulated:

"No claim for contribution in general average shall be allowed in case the danger which necessitated the sacrifice or expenditure arise from default of the party claiming contribution thereto, or of some person for whose default such party is responsible, *unless by the terms of the contract of affreightment the party claiming contribution* is relieved from liability *for the default.*" Proceedings of Conference, p. 212.

This resolution was not adopted, because it was considered undesirable to formulate general legal principles in these rules; and for the further reason that the *Montana* decision rendered the proposed qualification of the rule unavailing in the United States, as the law then stood.

A recent statement of the Scotch law, after repeating the rule that no general average can be claimed in case the peril arose from fault, continues:

"But where the other interests have agreed to run the risk

which has brought about the peril, a claim can be made, *e. g.*, where by the bill of lading the owners are freed from liability for the negligence of the master, and the sacrifice has been necessary because of a peril due to negligence on his part."

Green's Encyclopædia of the Law of Scotland, vol. I., p. 364 (Edinburgh, 1896).

Before the passage of the Harter act this precise point had not been decided in the United States. As the clause of exoneration was here held unlawful, such attempted exemptions by contract were deemed entirely ineffective.

In the *Ontario*, Mr. Justice Brown, then District Judge, had occasion to consider the question of negligent stranding in relation to the liability of an *underwriter*. The opinion, in passing, touches on the ordinary case of general average between vessel and cargo:

"If this were an action by the shipowner against the owner of the cargo for a general contribution, we apprehend that it would be a sufficient answer to show that the necessity for the sacrifice was occasioned by the negligence or unseaworthiness of the ship. We understand the law to be as stated in Gourl. Gen. Av. 15, that 'if the necessity for the general average act arises through the unseaworthiness of the vessel, the vice propre of the cargo, or the negligence or barratry of the master or crew, no contribution generally would be due. If the danger and the necessary sacrifice are produced by the fault of the vessel or captain, and the vessel appears as a claimant for contribution, it would seem a proper answer that he by whose neglect the loss had been produced should bear it without relief.' See, also, Lowndes Av. 138; Chamberlain *v.* Reed, 13 Me., 357; *The Ann Elizabeth*, 19 How., 162; Ross *v. The Active*, 2 Wash. C. C., 226; *The Jenny Jones*, Deady, 82; Bentley *v.* Bustard, 16 B. Mon., 643; *The Norway*, Brown & L., 377; Schloss *v.* Heriot, 14 C. B. (N. S.) 59. There can be no doubt in my mind, under the facts of this case, that if the owners of the cargo sacrificed had sued the vessel and her owners, they would have recovered not merely a general average contribution, but the entire value of the property."

37 Fed. Rep., 220, 222 (1889).

In the case of Ralli *v.* Troop (37 F. R., 898), the principle

was discussed in a case of fire alleged to have been negligently started. The district court said at p. 890:

"It is no doubt the ordinary rule in the law of general average, that, where the ship's negligence has made the sacrifice necessary, she cannot recover a general average contribution from the cargo. Many of the maritime codes expressly so provide, and the text books so state the rule. See the recent case of *The Ontario*, *ante*, 222. This proceeds, as I understand, upon the ground that the ship is herself responsible to the cargo for her own neglect. She therefore cannot take from the cargo under the name of 'general average' what she is at the same moment bound to make good and restore by reason of negligence. *If that is the foundation of the rule, it cannot apply to those causes of sacrifice for which the ship and owners are not legally liable*, and by the British statute, as well as the statutes of the United States, there is no liability for loss by fire 'without the owner's fault or privity.' Macl. Shipp. 9, 121; Rev. St. U. S., §4282. *To deny the owners the benefit of a general average contribution on the ground of negligence would impose upon them, in effect, a liability for the fire, from which the statute exempts them.*"

See the *Nicanor*, 44 F. R., 509.
The *Energia*, 61 F. R., 222, 224.

Both in England and in the United States it has been held that the exoneration of the owner for the liability for fire on shipboard by statute did not effect the contribution due *from him* for subsequent general average sacrifices to quench the fire.

Schmidt *v.* Steamship Co., 45 L. J. Q. B., 646.
Crooks *v.* Allan, 5 Q. B. D., 38.
The *Roanoke*, 46 F. R., 297; 53 do, 270; 59 do, 161.

In other words, the liability for causing the fire, and the duty to contribute to sacrifices to save the adventure from that fire, were distinct. The owner, being relieved from the cause of the fire, was on an equality with the cargo, as far as regards contribution for saving the common adventure. The *Roanoke* fire was on May 17, 1890, before the Harter act.

A recent decision in Belgium sustains the owner's right of general average contribution in case of collision by fault of

the master, where he was protected by the exemptions against negligence, which principle is declared to be now accepted

" d'une manière quasi-unanime les auteurs et la jurisprudence des cours et tribunaux étrangers."

The *Alacrity*, Revue internationale du droit maritime, vol. XI., p. 123.

The same line of reasoning has been followed in *salvage* decisions.

In cargo *ex Capella*, L. R., 1 A. & E., 356, Dr. Lushington pronounced against a claim of salvage by one colliding vessel against cargo on the other, both ships having been mutually at fault for the collision. In substance he held that the shipowner could not recover for his own wrong. This is decided also in the *Clarita* and the *Clara* 23, Wall., 1, 19. (1874.) But if the shipowner be not liable for the particular acts or accidents that imperil the cargo—these being excepted in the bill of lading—it is well settled that he can receive full salvage.

The *Miranda*, L. R., 3 A. & E., 561.
The *Laertes*, 12 P. D., 187.

The law of *limited liability*, though having a different effect on the right to general average, is not contrary to this principle. That statute does not take away all liability and absolve the vessel owner, but only reduces the sum recoverable in damages.

It does not change the legal relations, but only abridges the *remedy*.

Hence, although the shipowner pay the statutory sum into court, he is not completely absolved, so as to cancel all pre-existing liability, but if his vessel be raised, his fault disentitles him to recover any contribution therefor in general average, where there is no negligence clause in the contract.

The *Ettrick*, L. R., 6 P. D., 127.

All courts* therefore recognize that the only bar to re-

*Those of Holland, being limited by the express prohibitions of the code, are an exception. See the *Mary Thomas* [1894] P. 104. Even there an exception has since been adopted in bills of lading that expressly waived the article of the code—which contract is now understood to be valid and effective.

covery of general average is a counter-liability to answer for the original cause of the damage. If, however, the relations have been varied so that the master's acts are not imputed to the owner, then this ultimate liability being withdrawn, the cargo has no ground to decline to contribute to all sacrifices made in its behalf.

IV.—THE OBJECT OF THE HARTER ACT WAS TO BRING TO SHIPOWNERS IN THIS COUNTRY THE SAME RELIEF WHICH SHIPOWNERS IN EUROPE ALREADY ENJOYED THROUGH LIBERTY OF CONTRACT AGAINST NEGLIGENCE. IT WAS FURTHER DESIGNED TO MAKE THIS EXEMPTION CERTAIN, UNIFORM AND UNVARYING BY A STATUTE ESTABLISHING CLEARLY THE LINE OF LIABILITY AND EXEMPTION FOR THE ACTS OF THE SHIP'S SERVANTS.

After the bill had been amended in the Senate, in its present form, Mr. Lind, of the House Committee, in charge of the measure, said:

"As the law now stands, American vessels are subjected to certain hardships from which they cannot exempt themselves by contract or otherwise, to which foreign vessels are not subjected. A foreign vessel, of course, can contract with a shipper and make provision against any liability of its masters or owners; but the object of this bill is to limit this right. An American vessel cannot make any such contract or absolve itself from any such liability, for the reason that it is always amenable to the Federal courts, and the Federal courts have always held that contracts of that character are against public policy."

Congressional Record, 52nd Cong., Secd. Session, p. 1181.

In the *Delaware* (161 U. S., 459), Mr. Justice BROWN said:

"It is entirely clear, however, that the whole object of the act is to modify the relation previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provision, which are evidently designed *to fix the relation between* the cargo and the vessel and to prohibit contracts restricting the liability of the vessels and owners in certain particulars connected with

the construction, repair and outfit of the vessel, and the care and delivery of the cargo."

In an early case under the Harter act, it was said:

"In return for these beneficial provisions in favor of the cargo, the cargo seems designed to bear the losses from faulty navigation that would have previously been charged upon the ship." The *Viola*, 60 F. R., 296, 298.

V.—THE THIRD SECTION OF THE ACT MODIFIES THE RELATION BETWEEN THE SHIPOWNER AND HIS SERVANTS WHATEVER MAY BE THE FORM OF PROCEEDING. THE SHIPOWNER IS RELIEVED FROM FAULTS OF NAVIGATION. WHETHER HE IS LIBELLANT FOR A CONTRIBUTION, OR DEFENDANT IN A DAMAGE SUIT, HE STANDS CLEARED OF ALL FAULT OF HIS SERVANTS.

The language of the third section of the act is clear and comprehensive:

"Neither the vessel, nor her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The words "become or be held responsible" cover every possible form of liability. By this statute, the ship is exempted from every consequence of the faults or errors of the master or crew.

Thes relations are fixed so that henceforth the navigation and management are put outside the limits of the shipowner's responsibility. It is more than a "statutory bill of lading" (The *Chattahoochee*, 74 F. R., 904). It is an absolute determination of the claims that the cargo may make upon the ship even in the absence of contract between the parties. The former recompense in damages which the cargo owner could obtain from the carrying ship is taken away; and on proof that the owner had a seaworthy vessel, the former liability never comes into being.

It is unreasonable to contend that the shipowner, while freed from a suit for stranding of his ship and consequent damages

to cargo, is nevertheless chargeable with the acts of his servants, so that he cannot make sacrifices and recover in general average. Such an interpretation would mutilate the statute, and would be repugnant to plain principles of commercial law. The cross-liabilities that formerly existed between the ship-owner on the one side for the acts of his servants, and the cargo interest for the sacrifices in its behalf, no longer stand arrayed in opposition. The first liability is non-existent. It is not a case of a liability satisfied, limited or suspended by compliance with a remedial statute. It is effaced. Hence, in no form of proceeding can the owner directly or indirectly, be held responsible, for such damage or loss.

VI.—THE ARGUMENT OF STRICT CONSTRUCTION HAS NO PLACE WHERE THE WORDS ARE CLEAR AND UNAMBIGUOUS.

The duties of the shipowner are stated in very general terms in the first and second sections of the act. The tests of due diligence, what shall amount to proper equipment, the obligation to make the ship seaworthy, what may be faults or errors in navigation, or how far the management of the ship extends—these and the like, are all questions upon which the rule of strict construction may well be applied.

But once given a fault or error in navigation, no court can hold the owner or vessel responsible for resulting damage or loss without plain violation of the express terms of the statute. Unquestionably the purview of the statute must be limited in many ways by conservative maxims of construction. But a clear fault or error in navigation of a seaworthy ship remains outside of and beyond the responsibility of the ship-owner.

VII.—IF ANY DISTINCTION IS TO BE DRAWN BETWEEN CONVENTIONAL AND STATUTORY EXEMPTIONS, THEN THE LAW OF CONGRESS SHOULD HAVE AT LEAST AS BROAD A SCOPE AS A STIPULATION OF PRIVATE PARTIES.

In *The Delaware* Mr. Justice BROWN said:

"The Act was an outgrowth of attempts made in recent years to limit as far as possible, the liability of the vessel and

her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage and negligence in navigation and from forms of liability which had been held by the courts in England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequence of her own negligence."

161 U. S., 459, 472.

When Congress thus declares the rule of liability, the law is made certain for all transportation of cargo in vessels coming to or from this country. Whether before this statute private individuals could make such agreements, had long been mooted. Once the matter is settled by congressional action, the line is permanently established. Even if the act did, in substance, make a statutory bill of lading, as the court of appeals in the first circuit said, it is stronger in its effect and more conclusive upon the cargo than any instrument passed merely between private parties.

Clauses in a private contract attempt to release a liability, and operate as a waiver of existing rights. But this statute goes to the root of the rights themselves, and hence its effect is beyond that of any conventional discharge of liability.

The argument by Mr. Carter that the rule of strict construction, which is applicable to statutes, does not apply to the contracts of a common carrier, is palpably against the jurisprudence of this court. Such contracts by carriers against negligence have always been strictly construed even to the point of holding the negligence clauses wholly void (129 U. S., 441), and those exemptions more general in scope, which were suffered to stand at all, are regarded by this court as inserted by the shipowner for his own benefit, and "unquestionably to be construed most strongly against him."

Compania la Flecha *v.* Brauer, 168 U. S., 104, 118.

Indeed, the construction of *statutes* both here and in England, is far less strict than under those salutary canons by which the so called *contracts* of carriers are construed most strictly, when they attempt thereby to escape their common law liability.

In the cases of salvage, which have been before referred to, the owner has full right to recovery—even receives a merito-

torious reward—where he is not answerable for the cause of the damage, although the peril is a breakdown of his own ship. Salvage requires higher grounds of equitable merit than contribution in general average.

The idea that it is inequitable for the cargo to contribute to make good the owner's sacrifices really comes from a reluctance to accept the scope of the statute. The legal responsibility, though thus abolished, is so familiar and deep-seated that it is still effective in the mind of underwriters. Hence it is difficult for them to conceive of the mutual rights, where the ship-owner's imputed responsibility, so long held by the courts as lasting all through the voyage, is reduced by statute to those acts only that are directly under the owner's control.

VIII.—To limit the statute to suits by cargo (where the ship-owner is concededly protected) leaving the ship unprotected where general average is concerned, would be disastrous to commence.

To take this case of *The Irrawaddy*. During fog the steamer has stranded, presumably from the failure of the master properly to use the lead. Whatever damage the cargo *had* sustained at this point, or whatever burden it *may* incur to be rescued, cannot be recovered from the ship. In this state of things what is to be done? The whole law of general average is designed to facilitate prompt action in time of danger, so that the master or owner will be free to sacrifice any property for the good of all. If the view of the law contended for by the appellant were to prevail, at such a juncture, the master for the owners would decline to sacrifice their property to avert a loss for which they were in no respect accountable. The master communicating with his owner would be informed that for such sacrifice of the ship and appurtenances no contribution could be had from the cargo. Naturally he would not act.

This court in the case of Ralli *v.* Troop (157 U. S., 386), has decided that only the master can make a legal general average sacrifice binding all interests.

In substance then, the position of the appellants, if sus-

tained, would tend to destroy all general average at the time when the greatest peril existed. Its disastrous consequences to commerce would be incalculable.

The position in this case of the cargo is not logical. It admits a liability for all salvage which the shipowner has incurred and paid. But the cutting through the bulkheads of the vessel and flooding the engine room (libel, Art. 4; Record, p. 2) are just as much of an independent sacrifice at the cost of the owner, as the outlays which are made to wreckers. No distinction, such as is here attempted to be maintained, is practicable. Suppose a vessel is in distress and in peril of going ashore and the masts are cut away. Is this any less a sacrifice because the *pilot* may have allowed the ship to approach too near a lee shore? Whether the shipowner could recover for the mast would depend on the rule of local law whether he was answerable for the neglect of the pilot. If not, the sacrifice to the ship would be as clearly recoverable, as the money the shipowner might pay a salvor to have the ship afterwards extricated.

IX.—THERE IS NOTHING INEQUITABLE, BUT THE REVERSE, IN LIBELLANTS' RIGHT TO CONTRIBUTION FOR THE LATER SACRIFICES MADE IN ORDER TO FLOAT THE VESSEL.

It seems to be contended (and is the idea of some cargo underwriters), that such sacrifices are only proper and reasonable outlays for the shipowner to make from his own pocket. They consider that his property should be thus burdened because of the negligence of his servants in the stranding of the ship. But the shipowner, in making the sacrifices, acts as a trustee for all interests committed to his charge. It is equitable that he should have full contribution, unless some interest can offset some cross-liability or counter-equity. When Congress has declared that the owners is freed from any liability for these prior losses, it would be grossly inequitable to take his property to help repair them.

In the *Mary Thomas* [1894] P. 104, 117, Mr. Justice BARNES said :

"It seems to me quite obvious that when, by the terms of the contract of carriage, certain responsibilities are excepted—that is to say, in that particular case the negligence of the master or officers, which produced a stranding, that the owners, not being responsible for the consequences of this negligence—the position is this: that the shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk; and going back to the way in which this matter is discussed in some of the old books, if both of the parties were there at the time, each responsible for the difficulty in which they found themselves, that is to say, each of them bearing the loss which would result from it, they would naturally say, 'We must spend some money to get out of this difficulty, and that we must share in the proportion to the benefit to be derived from it.' And that seems the basis of the reasoning in this case, and therefore indirectly the contract of carriage does vary the position of the parties with regard reference to the general average, because it varies the risks which the general interests are exposed to.

The contention of the senior counsel for the appellant is that the decision of the court below offends against a *principle.* Not one of abstract right, for he admits that by that standard no one, including a shipowner, is answerable for another's fault. Not a matter of logic, because to deny the shipowner contribution in general average is to make him responsible for that from which Congress has absolved him. This elusive *principle* invoked then is but a rule of artificial law, so long received in human society that men can hardly change it.* Congress may extinguish the liability on which it rests, but the rule itself has a mystical and sacrosanct character that virtually makes it perpetual.

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* Although the incidents of the law of general average have come down from a far antiquity, even that elder branch of the maritime law cannot claim the quotation in Mr. Carter's brief, "nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac." This was not said of any law of man. Only those abstract principles of eternal justice—that supreme law above us all—were meant, as the continued text shows:

"Sed et omnes gentes et omni tempore, una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus; ille legis hujus inventor, disceptator, lator, cui qui non parebit, ipse se fugiet, ac, naturam hominis aspernatus, hoc ipso luet maximas poenas, etiam si cetera supplicia quæ putantur effugerit." De republica, lib. III, Cap. XXII.

This would give to rules of law a fixity and defect of logic, which happily they cannot possess. It may be a natural belief of the lawyer that his sets of rules endure—a superstition from which perhaps none are wholly free. In the sixteenth century, this view of the permanence of legal rules was recognized as an obstacle to progress. None before or since have surpassed Cujas in exposition of the civil law; his warning against giving too much effect to mere legal rules is impressive.

Every rule of the civil law, he said, is slippery and perilous; it is not certain, not rigid, not perpetual. It rests on relative reasoning, not, like scientific truth, on absolute deduction from necessary premises. Law has no necessary deductions.

"Omnis ergo regula juris civilis lubrica et periculosa est, non certa, non necessaria, non perpetua. * * Jus quidem scientia est laxa notione, sed non simpliciter et absolutè, nam scientia ex necessariis necessaria concludit. Juris nulla est conclusio necessaria."

Cujacius, Opera, vol. 8, p. 707 (Paris, 1758).

The obligation to contribute for sacrifices made for the common safety is not such an artificial rule. It is a principle. The status of the persons on board, the duty as to slaves, the contribution for objects on the person of the passenger, the liability of the shipowner for prior faults in navigation—all these rules are subject to change. When the owner's constructive fault is abolished, he is entitled to give and take under the principle of contribution, like any other party in interest who is free from fault.

The other principle, that of uniformity in maritime law, is the best safeguard of justice to vessels and cargoes. The nearest approach to Cicero's ideal among human institutions is the widening sweep of the law of the sea as its ideas pass from land to land, tending to bring about a uniformity of right. To that principle appellees submit their cause. The decree below gives the same rights here that are acknowledged in other maritime States with which our commercial relations are close and intimate. It would be a reproach to Congress, and a deep injury to our jurisprudence, if our courts should hold these points of private international law adversely to the settled law

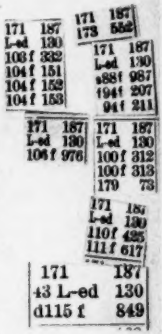
of Great Britain, France, Germany, the Netherlands, Denmark, and the Scandinavian States.

It is therefore respectfully submitted that the question certified should be answered affirmatively.

HARRINGTON PUTNAM
Advocate.

April 9, 1898.

THE IRRAWADDY.[1]



CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 591. Submitted April 11, 1898. — Decided May 31, 1898.

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under the provisions of § 3 of the act of February 13, 1893, c. 105, 27 Stat. 495, has not a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo.

The main purposes of the act of February 13, 1893, known as the Harter Act, were to relieve the ship owner from liability for latent defects, not discoverable by the utmost care and diligence, and, in the event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damages or loss resulting from faults or errors in navigation or in the management of the vessel; but the court cannot say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship.

In determining the effect of this statute in restricting the operation of general and well-settled principles, the court treats those principles as still existing, and limits the relief from their operation afforded by the statute to that called for by the language of the statute.

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[1] The docket title of this case is *Flint, Eddy & Company, Appellants,* v. *George Chrystall and James Greig, as Trustees.*

Statement of the Case.

THIS case comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The facts out of which the question arise are as follows:

On November 9, 1895, the British steamship Irrawaddy, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped and supplied, and was seaworthy.

The vessel was relieved from the strand November 20 as the result of sacrifices by jettison of a portion of her cargo, of sacrifices and losses voluntarily made or incurred by the ship owners through the master and of the services of salvors.

The Irrawaddy then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo and the losses and sacrifices of the ship owner.

The respondent thereupon paid $4483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the ship owner, which they refused to pay.

The District Court made a decree in favor of the libellants; from which decree the respondent duly appealed to this court.

Upon these facts the court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under the provisions of section 3 of the act of February 13, 1893, a right to general average contribution for

sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo?

Mr. Wilhelmus Mynderse and *Mr. James C. Carter* for appellants.

Mr. Harrington Putnam for appellees.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

The answer we shall give to the question certified by the Circuit Court of Appeals must be determined by the meaning and effect which should be given to the act of February 13, 1893, c. 105, 27 Stat. 445, known as the Harter Act. Admittedly, upon the facts conceded to exist in the present case, the owner of the ship has no right to a general average contribution from the cargo, unless such right arises from the operation of that act.

We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law responsible to the co-contributors. We are not called upon either to trace the history of the rule, or to justify it as based on equitable principles, as it is conceded on both sides that such is the ordinary rule in the absence of statute or contract to modify it.

Nor is it necessary to inquire into the origin or nature of the law of general average. That has been so recently and thoroughly done in *Ralli* v. *Troop*, 157 U. S. 386, that it is sufficient to refer to the opinion of Mr. Justice Gray in that case.

Not only is the ship owner excluded from contribution by

way of general average when the loss arises from the ship's fault, but he is legally responsible to the owner of the cargo for loss and damages so occasioned. And it is the well-settled law of this court that a common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from responsibility for loss or damage arising from the negligence of the officers or crew; that it is against the policy of the law to allow stipulations that will relieve a carrier from liability for losses caused by the negligence of himself or his servants. *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397.

Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy at the time of beginning her voyage, or that he has used his best efforts to make her seaworthy; and that his undertaking is not discharged because the want of fitness is the result of latent defects. *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408; *The E. J. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124.

In this condition of the law the so called Harter Act was approved on February 13, 1893, wherein, after providing in the first and second sections that it shall not be lawful for any owner, agent or master of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to exempt himself from liability for loss or damage arising from negligence in the loading or proper delivery of such property, or to insert in any bill of lading any covenant or agreement whereby the obligations of the owner to exercise due diligence in manning and equipping the vessel, and to make such vessel seaworthy and capable of performing her intended voyage should be in anywise lessened, weakened or avoided, it was, in the third section, enacted as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel

in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from the danger of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The argument on behalf of the ship owner is clearly expressed by the learned judge of the District Court in the following terms:

"There is no doubt, I think, that the liability to indemnify the cargo owner is the sole ground of the exclusion of the ship owner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation. It therefore seems necessarily to follow that in cases where all such liability is abolished by law, as it is under the circumstances of this case by the Harter Act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average. Where due diligence has been exercised to make the ship seaworthy, and a common danger arises upon the voyage by 'fault or error in the navigation or management of the ship,' the third section of that act declares that 'neither the vessel nor her owner, agent or charterer shall become or be held responsible for damage or loss resulting therefrom;' the previous liability of the ship owner to the cargo owner for faults of navigation is thus abolished in all cases coming within the act. In such cases faults in the navigation or management of the ship are no longer, by construc-

tion of law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo owner for his damages therefrom than the latter is liable to the ship owner for the resulting damages to the ship. Both are alike strangers to the fault, and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice, voluntarily incurred, and for the common benefit, as much and as truly so when made by the ship owner as when made by the cargo owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifice as the other." "The application of this new relation of non-responsibility under the Harter Act to cases of general average does not, in fact, make the least change in the principles of general average contribution. The rule remains as before, that he by whose fault, actual or constructive, the ship and cargo have been brought into danger cannot recover an average contribution for his expenses in extricating them. And so the counter rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue, is entitled to an average contribution from what is thereby saved. Prior to the Harter Act the ship owner, under our law, was constructively in fault for bad navigation and hence fell within the former rule. The Harter Act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter." (82 Fed. Rep. 472, 474–477.)

We are unable to accept this view of the operation of the act of Congress.

Plainly the main purposes of the act were to relieve the ship owner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the

management of the vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship?

Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the Federal courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American ship owner, and Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty.

Although the foundation of the rule that forbade ship owners to contract for exemption from liability for negligence in their agents and employés, was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.

But we think that for the courts to declare, as a consequence of this legislation, that the ship owner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. The act in question does, undoubtedly, modify the public policy as previously declared by the courts, but if Congress had intended to grant the further privilege now contended for it

would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the ship owner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew.

What was the reasoning on which the courts proceeded in holding that it was against public policy to permit ship owners to contract for exemption from liability for the negligence of their agents? Was it not that such a state of the law would impel the ship owners to exercise care in the selection of those for whose conduct they were to be responsible? This being so, can it be reasonably inferred that Congress intended, when relieving ship owners from liability for the misconduct of their agents, to confer upon them the further right to participate in a general average contribution, and that to the detriment of the shippers? Such an interpretation of the statute would tend to relieve ship owners, to some extent at least, from care in the selection of the master and crew; and it would likewise operate to influence the master in deciding, in an emergency, whether he would make a case of general average by sacrificing the vessel, in whole or in part. If he knew that the owner would participate in a contribution occasioned by a loss, he would be the less likely to exert himself and crew to avoid the loss.

It is said that it has been decided by the English courts that when, by a contract in the bill of lading, the ship owner is exonerated from liability for loss caused by the fault of the master or crew, he is entitled to share in a general average contribution.

An examination of the cases cited has not convinced us that there has been any such final decision by the English courts. The case of *The Carron Park*, 15 P. D. 203, does, indeed, hold that the relation of the goods owner to the ship owner was altered by the contract; that the ship owner was not to be responsible for the negligence of his servants in the events which have happened; and that, therefore, the ship owner's claim for general average was allowed. On the other hand,

in the case of *The Ettrick*, 6 P. D. 127, where the ship owner claimed the benefit of a general average contribution rendered necessary by reason of negligence in navigation, and put his claim on the ground that, having availed himself of the limited liability laws by paying into court the £8 a ton, which is the limitation fixed by the statutes of Great Britain, he was thereby relieved from his liability on account of the negligence in the navigation, and stood in the position of an innocent party entitled to share in the contribution. But the Court of Appeals held otherwise, and Sir George Jessel, M. R., said:

"The ground upon which the ship owner puts his claim is this: he says that the payment of £8 per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or his agents that would give rise to any liability. But I cannot read the act so. All it says is that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. It does not give him any new rights as far as I can see. . . . It seems to me that he could have no such right, for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course there is an end of the case."

But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the ship owner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption.

Upon the whole, we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation

afforded by the statute to that called for by the language itself of the statute.

Our conclusion accordingly is, that the question certified to us by the Court of Appeals should be answered in the negative, and it is so ordered.

MR. JUSTICE BROWN, with whom was MR. JUSTICE MCKENNA, dissenting.

I am constrained to dissent from the opinion of the court in this case. While I freely concede that the owner of a ship is not by the general maritime law entitled to a general average contribution, where the loss is occasioned by the fault of the master or crew, I regard the third section of the Harter Act as introducing a new feature into the law of carriage by sea, and as eliminating altogether the question of negligence in navigation. This section provides in substance that if the owner shall exercise due diligence to make his vessel in all respects seaworthy, and properly manned, equipped and supplied, he shall not "be held responsible for damage or loss resulting from faults or errors in navigation or in the management" of his vessel.

As the steamer Irrawaddy was stranded on the coast of New Jersey, confessedly by the negligent navigation of her master, it will not be contended that she or her owners became liable to the owners of the cargo for any damages thereby occasioned. It is said, however, that while the Harter Act may be appealed to in defence of any action by the cargo against the ship, it is not available by the ship owner in a suit against the owners of the cargo for a contribution to the general average expenses occasioned by such stranding. If this be so, then the ship is thereby made responsible for a fault in her navigation to the exact extent to which she would be otherwise entitled to a general average contribution, and the statute to that extent is disregarded and nullified. I consider this a narrow and technical construction of the act. I think the third section makes the question of fault in navigation an immaterial one, and eliminates it from

the relations of the ship to the cargo. The section, therefore, becomes available to the ship owner either as a weapon of defence or attack. If the ship owner stands in relation to the cargo as if no fault had been committed, it is impossible for me to see why he may not avail himself of this in whatever shape the question may arise.

As the Harter Act is a novelty in maritime legislation, of course it would be vain to search for authorities based upon a similar enactment; but cases are by no means wanting where a similar question has arisen upon stipulations in bills of lading exempting the owner of the ship from the consequences of faults or errors in navigation. While it is conceded in this country that such stipulations are of no avail, it is equally well settled that by the law of England, and of some, if not all, of the maritime nations of continental Europe, they are held to be valid and binding.

In the case of *The Carron Park*, 15 P. D. 203, a charter party contained a stipulation that the ship owners were not to be responsible "for any act, negligence or default whatsoever of their servants during the said voyage." The cargo having been damaged by water pouring through a valve, negligently left open by one of the engineers, the owners brought suit against the vessel, and the owners of the ship counterclaimed for a general average contribution. It was held by the Admiralty Division that the ship was exonerated in the suit against her by the owners of the cargo, and was also entitled to her contribution. In delivering the opinion, Sir James Hannen, President, observed: "The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the ship owner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen upon the ship owner, and the expenditure or sacrifice made by him is not made to avert loss from himself alone, but from the cargo owner." The case of *Strang* v. *Scott*, 14 App. Cas. 601, was cited to the proposition that the conditions ordinarily existing between parties standing in the relation of ship and cargo owners may be varied by special contract.

It is true that the case of *The Carron Park* was not one arising upon a statute but upon a stipulation in a charter party; but I think it can make no possible difference in the legal aspect of the case whether the exemption be conceded by contract or granted by statute.

The case of *The Ettrick*, 6 P. D. 127, is not in point. In that case the owner of a ship, sunk by a collision in the Thames, admitted the collision to be his fault, and paid into court eight pounds a ton in a suit to his liability. The ship having been subsequently raised at the expense of the owner, he sought to recover in general average against the cargo its contributory portion of such expenses. It was held that this could not be done, the court basing its opinion upon the language of the Merchants' Shipping Act, section 54, which merely declared that the owners of the ship should not be *answerable for damages* in respect of losses to ships or goods to a greater amount than eight pounds per ton of the ship's tonnage. In delivering the opinion of the court, Sir George Jessel observed: "That is merely the limit of the liability for damages. It does not in any way alter the property. . . . Now, property not being altered, the ground upon which the ship owner puts his claim is this: He says that the payment of eight pounds per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or by his agents that would give rise to any liability. But I cannot read the act so. All that it says is, that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. . . . It seems to me that he would have no such right," (that is, to salvage on the cargo,) "for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course that is an end of the case."

In the case of *The Carron Park* the stipulation exempted the ship from the consequences of all negligence in her navigation. In *The Ettrick* the act simply limited the liability of

the owner in damages to a certain sum per ton. The operation of the Merchants' Shipping Act was evidently intended to be merely defensive. *The Ettrick*, though cited by counsel, was not referred to by the court in *The Carron Park*, and was evidently regarded as standing upon a different footing.

The French law in this particular is the same: The case of *Le Normand* v. *Compagnie Générale Transatlantique*, 1 Dalloz, Jurisprudence Générale, 479, before the French Court of Cassation, was an appeal from the court of Rouen, which had treated as general average the expenses of salvage and towage of the steamer Amérique, after having found that the abandonment of the ship was imputable only to the master and crew, and had held that a contract exempting the ship from the consequences of negligence, permitted the owners of the ship to recover from the owners of the cargo their share in contribution of the expenses of salvage. In the opinion of the Court of Cassation upon appeal it was said that in this bill of lading the defendant company, the owner of the Amérique, had formally excepted the acts of God, of enemies, pirates, fire by land or sea, accidents proceeding from the engine, boilers, steam and all other accidents of the sea caused or not caused by the negligence, fault or error of the captain, crew or engineers, of whatever nature these accidents were, or whatever were their consequences. It was further said that no law forbade the owners of ships from stipulating that they would not answer for the faults of the captain or crew; that such an agreement is no more contrary to public policy than to fair dealing; that in upholding this clause in the bill of lading by which the defendant company declined responsibility for the faults of the crew, the decree appealed from violated no law. It was thereby established that the ship had been abandoned at sea, after consultation with the crew; that it had afterwards been picked up by three English vessels, which had towed it to Plymouth, where it was voluntarily stranded, and that the defendant company had reclaimed it from the salvors by paying the expenses of salvage and towage; and thereupon the court held that this was a damage voluntarily suffered, that the expenses were incurred

for the common safety of the ship and cargo, and without the payment of which the salvors would not have been obliged to deliver over the vessel, and that such expenses constituted a claim for general average, notwithstanding the abandonment of the ship was not attributed to a peril of the sea, but to the fault of the master and crew. The decree was affirmed.

The case of *Crowley* v. *Saint Frères*, 10 Revue Internationale du Droit Maritime, 147, also came before the French Court of Cassation in 1894. In this case, an English ship, the Alexander Lawrence, on a voyage from Calcutta to Boulogne, with a cargo of jute, took fire through the carelessness of a sailor. The ship put into Port Louis, an immediate port, with the cargo still burning, and extinguished it, subsequently arriving at her port of destination. By a clause in the charter party the ship was exonerated from responsibility for negligence. It was held that the expenses of putting into the port of refuge should be classed as general average, and not as particular average, as it had been held by the court below. The decree of that court (of Douai) was therefore reversed.

A case arising from the same disaster to the Alexander Lawrence, between the owners and the underwriters, 11 Revue Internationale, 41, subsequently came before the Court of Appeal of Orleans, on appeal from the Tribunal of Commerce of Boulogne, where a similar ruling was made, and the expenses of putting into port classed as general average under the stipulation in the charter party, although in the absence of such stipulation they would have been chargeable to the ship.

The same question came before the Tribunal of Commerce of Antwerp, Belgium, in the case of *The Steamer Alacrity*, 11 Revue Internationale, 123, where the cargo was held to contribute to the expenses of putting into a port of refuge, in consequence of a collision due to the fault of the captain, the ship owner being exonerated by his contract from the consequences of this fault. In this case the parties had stipulated that general average expenses should be payable under the York-Antwerp rules, and that the ship should not be responsible for the faults of the captain or crew. It was

held that, by the Belgium law, parties might contract with reference to these rules, which declared the expenses of putting into a port of refuge general average; that there was no difference between such expenses when occasioned by an inevitable accident or in consequence of the fault of the captain; that the parties having stipulated that the ship should be exonerated from the consequences of such fault, the owners of the cargo were bound for their contributory shares.

From the case of *The Mary Thomas*, P. D. 1894, p. 108, it would seem that the Dutch law is different; but it was said by Mr. Justice Barnes in this case (p. 116) that if the question had arisen in this country (England) "the point could hardly have occurred, as it has done, because it has already been decided by Lord Hannen, in the case of *The Carron Park*, that the cargo owners would be liable for the contribution in general average under circumstances where the accident has occurred through negligence, but where by the bills of lading the owners of the ship were not responsible for that negligence."

These are all the cases I have been able to find directly upon the question under consideration, but there is a class of analogous cases which, I think, have a strong bearing in the same direction. It is well known that by the law of England a ship is not responsible to another for a collision brought about by the negligence of a compulsory pilot. Of course where such ship is solely to blame the rule is easy of application. No recovery can be had against her. But where the faults of the two vessels are mutual, a different question arises; and in the case of *The Hector*, 8 P. D. 218, it was held that, where a collision occurred by the mutual fault of two vessels, and one of such vessels had on board a compulsory pilot, whose fault contributed to the accident, the owner of that vessel was entitled to recover a moiety of the damages sustained by her without any deduction on account of the damage sustained by the other; in other words, she was not responsible for any portion of the damage done to the other vessel, but might recover the half of her damages from such other vessel. Said the Master of the Rolls in delivering the opinion:

"With regard to the Augustus, she was found to blame for the collision, therefore she is, in the first instance, liable to pay all the damage which the Hector has suffered. With regard to the Hector, it is found that her owners are not to blame, but that her navigation was to blame; but that was the fault of the pilot. The owners are not liable for this default, therefore they are not liable for anything to the owners of the Augustus. What is the result? That the liability of the owners of the Augustus is declared to have been proved, but the liability of the owners of the Hector is disproved, and they are dismissed from the suit. Therefore no balance is to be calculated; the owners of the Hector are not liable for a single pennyworth of the damage done to the Augustus. The owners of the Augustus must go against the pilot and get what they can out of him; but the Hector is entitled to succeed."

See also *Dudman* v. *Dublin Port and Docks Board*, Irish Rep. 7 C. L. 518; *Spaight* v. *Tedcastle*, 6 App. Cas. 217.

It seems to me that the cases above cited show an almost uniform trend of opinion against the principle laid down by the court in this case. I do not contend that the decisions of the English, French and Belgian courts should be recognized by us any further than their course of reasoning commends itself to our sense of justice; but upon questions of maritime law, which is but a branch of international law, I think the opinions of the learned and experienced judges of these courts are entitled to something more than respectful consideration. It is for the interest of merchants and ship owners, whose relations and dealings are international in their character, that the same construction should, so far as possible, be placed upon the law maritime by the courts of all maritime nations, and I am compelled to say that I see no reason for creating an exception in this case.